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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 John Edward Sansing,) No. CV-11-1035-PHX-SRB
9 Petitioner,) DEATH PENALTY CASE
10 vs.)
11) **MEMORANDUM OF DECISION**
12 Charles L. Ryan et al.,) **AND ORDER**
13 Respondents.)
14)

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16 Petitioner John Edward Sansing, a state prisoner under sentence of death, has filed a
17 Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced in violation
18 of the United States Constitution. (Doc. 35.)¹ The petition raises 29 claims. Pursuant to the
19 Court's general procedures governing resolution of capital habeas proceedings, the parties
20 have briefed both the procedural status and merits of Petitioner's claims. (Docs. 37, 51.)
21 Petitioner has also filed a Motion for Evidentiary Development regarding four of his claims.
22 (Doc. 53.) As set forth below, the Court concludes that Petitioner is not entitled to either
23 evidentiary development or federal habeas relief.

24 **BACKGROUND**

25 ¹ "Doc." refers to the documents in this Court's Electronic Case File (ECF). "RT"
26 refers to reporter's transcript; "ROA" refers to the trial court record prepared for Petitioner's
27 direct appeal (Case No. CR-99-0438-AP). The original reporter's transcripts and a certified
28 paper copy of the record on appeal were provided to this Court by the Arizona Supreme
Court. (Doc. 63.) Additional state court records have been filed electronically by the parties.
(Docs. 37-44, 46, 52.) Citation to these records is to the ECF docket and page number.

1 In September 1998, Petitioner pled guilty to the first-degree murder, kidnapping,
2 armed robbery, and sexual assault of Trudy Calabrese. The Arizona Supreme Court
3 summarized the facts as follows:

4 On February 24, 1998, the defendant called the Living Springs Church
5 and requested delivery of a food box for his family. He gave the church
6 secretary his name and home address for the delivery. The defendant then
7 telephoned his wife, Kara Sansing, at work several times, primarily to discuss
8 how to obtain more crack cocaine for the two of them to smoke. During these
9 calls, the defendant informed his wife that he had obtained some crack
10 cocaine, that he had smoked some of it and was saving the rest for her. He also
11 told her that he had called a church and arranged for delivery of some food.
12 When Kara Sansing returned home at approximately 3:20 p.m., the couple
13 smoked the remaining crack cocaine. The defendant, in the presence of his
14 four children, informed Kara of his plan to rob the person who came from the
15 church with the food boxes so he could purchase more crack cocaine.

16 Trudy Calabrese left the Living Springs Church in her truck at
17 approximately 4:00 p.m. She arrived at the Sansing home shortly thereafter,
18 parked in front of the house, and delivered two boxes of food. Ms. Calabrese
19 chatted with Kara Sansing in the kitchen while the defendant signed a receipt
20 for the delivery. Before Ms. Calabrese could leave, the defendant grabbed her
21 from behind and threw her to the dining room floor. Aided by his wife and
22 with his children watching, the defendant bound her wrists while she cried,
23 "Lord, please help me" and, "I don't want to die, but if this is the way you
24 want me to come home, I am ready," and repeatedly asked the defendant's
25 children to call the police. The defendant instructed his children to go into the
26 living room and watch television.

27 Using a club, the defendant struck Ms. Calabrese in the head several
28 times with force sufficient to break the club into two pieces and render her
temporarily unconscious. Leaving her on the dining room floor, the defendant
took her keys and moved her truck to a business parking lot nearby. At some
point before he returned, Ms. Calabrese regained consciousness. Upon his
return, the defendant dragged her into his bedroom and sexually assaulted her.
Kara Sansing, who witnessed the rape, testified that she heard the defendant
and Ms. Calabrese speaking during the rape. The defendant then fatally
stabbed her in the abdomen three times with a kitchen knife. During the attack,
the defendant placed a sock in Ms. Calabrese's mouth and secured two plastic
bags over her head with additional cords and a necktie. According to the
medical examiner, she lived several minutes after being stabbed. After the
murder, the defendant left the bedroom and went to look out the dining room
window to make certain no one had observed his actions.

The defendant then removed Ms. Calabrese's jewelry and left her body
in his bedroom, covered with laundry, for several hours. The defendant
engaged in two separate drug transactions shortly after the murder. First, he
telephoned a drug dealer and arranged to trade the victim's rings for crack
cocaine. Later, he arranged to trade her necklace for more crack cocaine.

Later in the evening, Pastor Becker from Living Springs Church called
the Sansing home looking for Ms. Calabrese and spoke to the defendant. The
defendant, giving a false address, told the pastor that she had never arrived.

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2 Late that night, the defendant dragged Ms. Calabrese from the bedroom
3 to the backyard and placed her body in a narrow space between the back of his
4 shed and the fence. He covered her with a piece of old carpeting and other
debris. At least three of the four Sansing children saw the body behind the
shed. At some point, the defendant washed the bloody club and hid the clothes
he had used to cover her body in a box in the bedroom.

5 The next day, searchers found Ms. Calabrese's truck in a parking lot
6 near the Sansing home. Inside, they found a piece of paper with the Sansings'
7 correct address. The police went to the Sansing home and discovered the
8 victim's body behind the shed. The defendant, who had driven to his sister's
9 house, admitted to her that he and his wife had killed Ms. Calabrese.
Eventually, the defendant's father telephoned the police and reported the
defendant's location. The defendant knew the police were coming and did not
attempt to flee. When the police arrived, he submitted to custody peaceably
and without resistance.

10 *State v. Sansing*, 200 Ariz. 347, 351-52, 26 P.3d 1118, 1122-23 (2001) (*Sansing I*).

11 In September 1999, Maricopa County Superior Court Judge Ronald S. Reinstein held
12 a sentencing hearing to determine the existence of aggravating and mitigating circumstances.
13 The court found that the State had proven beyond a reasonable doubt that Petitioner
14 committed the crime in the expectation of pecuniary gain, A.R.S. § 13-703(F)(5),² and that
15 Petitioner committed the murder in an especially cruel, heinous, or depraved manner, A.R.S.
16 § 13-703(F)(6). The court further found that Petitioner had failed to prove any statutory
17 mitigating circumstances under A.R.S. § 13-703(G), but that he had established five non-
18 statutory mitigating circumstances: (1) impairment from the use of crack cocaine; (2) a
19 difficult childhood; (3) acceptance of responsibility and remorse; (4) lack of education; and
20 (5) family support. Weighing the sentencing factors, the court determined that the proven
21 mitigation was not sufficiently substantial to outweigh the aggravation and sentenced
22 Petitioner to death.

23 On appeal, the Arizona Supreme Court struck the pecuniary gain aggravating factor
24 but nonetheless affirmed. *Sansing I*, 200 Ariz. at 355-56, 26 P.3d at 1126-27. Subsequently,
25 the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), holding that
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27 ² Section 13-703 has since been transferred and renumbered as A.R.S. § 13-751
28 (2011).

1 Arizona's aggravating factors are an element of the offense of capital murder and therefore
 2 must be found by a jury. The Court granted Petitioner's petition for certiorari, vacated the
 3 Arizona Supreme Court's judgment, and remanded for further consideration in light of *Ring*.
 4 *Sansing v. Arizona*, 536 U.S. 954 (2002) (mem.). On remand, the state court determined that
 5 the lack of jury findings as to aggravation constituted harmless error in Petitioner's case.
 6 *State v. Sansing*, 206 Ariz. 232, 77 P.3d 30 (2003) (*Sansing II*). The Supreme Court denied
 7 a petition for certiorari. *Sansing v. Arizona*, 542 U.S. 939 (2004).

8 Petitioner then sought post-conviction relief in state court, raising six claims for relief.
 9 In July 2008, the trial court dismissed five of the claims as meritless or procedurally
 10 precluded. It held a four-day evidentiary hearing on the remaining claim, which alleged
 11 ineffective assistance of counsel at sentencing, and ultimately denied relief in July 2010. The
 12 Arizona Supreme Court summarily denied a petition for review in May 2011, and Petitioner
 13 thereafter initiated these habeas corpus proceedings.³

14 APPLICABLE LAW

15 Because it was filed after April 24, 1996, this case is governed by the Antiterrorism
 16 and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). *Lindh v. Murphy*, 521
 17 U.S. 320, 336 (1997); *see also Woodford v. Garceau*, 538 U.S. 202, 210 (2003). The
 18 following provisions of the AEDPA will guide the Court's consideration of Petitioner's
 19 claims.

20 **I. Principles of Exhaustion and Procedural Default**

21 Under the AEDPA, a writ of habeas corpus cannot be granted unless it appears that
 22 the petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see*
 23 *also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509 (1982).

24
 25 ³ Petitioner complains that he was directed to file his habeas petition prior to
 26 expiration of the statute of limitations under 28 U.S.C. § 2244(d) and that he therefore
 27 "reserves the right to amend this petition any time before the one year statutory deadline
 28 expires without being required to meet the strict requirements for amendment imposed by
Mayle v. Felix, 545 U.S. 657." (Doc. 35 at 10.) Because Petitioner did not seek to amend
 his petition, either before expiration of the limitations period or after, this issue is moot.

1 To exhaust state remedies, the petitioner must “fairly present” his claims to the state’s highest
2 court in a procedurally appropriate manner. *O’Sullivan v. Boerckel*, 526 U.S. 838, 848
3 (1999).

4 A claim is “fairly presented” if the petitioner has described the operative facts and the
5 federal legal theory on which his claim is based so that the state courts have a fair
6 opportunity to apply controlling legal principles to the facts bearing upon his constitutional
7 claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78
8 (1971). Unless the petitioner clearly alerts the state court that he is alleging a specific federal
9 constitutional violation, he has not fairly presented the claim. *See Casey v. Moore*, 386 F.3d
10 896, 913 (9th Cir. 2004). A petitioner must make the federal basis of a claim explicit either
11 by citing specific provisions of federal law or federal case law, even if the federal basis of
12 a claim is “self-evident,” *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999), or by citing
13 state cases that explicitly analyze the same federal constitutional claim, *Peterson v. Lampert*,
14 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

15 In Arizona, there are two primary procedurally appropriate avenues for petitioners to
16 exhaust federal constitutional claims: direct appeal and post-conviction relief (PCR)
17 proceedings. Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings
18 and provides that a petitioner is precluded from relief on any claim that could have been
19 raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive
20 effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions
21 (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the claim was
22 omitted from a prior petition or not presented in a timely manner. *See Ariz. R. Crim. P.*
23 *32.1(d)-(h), 32.2(b), 32.4(a).*

24 A habeas petitioner’s claims may be precluded from federal review in two ways.
25 First, a claim may be procedurally defaulted in federal court if it was actually raised in state
26 court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S.
27 at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed to present
28 it in state court and “the court to which the petitioner would be required to present his claims

in order to meet the exhaustion requirement would now find the claims procedurally barred.”
Id. at 735 n.1. If no remedies are currently available pursuant to Rule 32, the claim is
 “technically” exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1; *see*
also Gray v. Netherland, 518 U.S. 152, 161-62 (1996).

Because the doctrine of procedural default is based on comity, not jurisdiction, federal
 courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*,
 468 U.S. 1, 9 (1984). As a general matter, the Court will not review the merits of a
 procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure
 to properly exhaust the claim in state court and prejudice from the alleged constitutional
 violation, or shows that a fundamental miscarriage of justice would result if the claim were
 not heard on the merits in federal court. *Coleman*, 501 U.S. at 750. Ordinarily, “cause” to
 excuse a default exists if a petitioner can demonstrate that “some objective factor external
 to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Id.* at
 753; *see also Martinez v. Ryan*, 132 S. Ct. 1309 (2012). “Prejudice” is actual harm resulting
 from the alleged constitutional error or violation. *Vickers v. Stewart*, 144 F.3d 613, 617 (9th
 Cir. 1998).

II. Standard for Habeas Relief

The AEDPA established a “substantially higher threshold for habeas relief” with the
 “acknowledged purpose of ‘reducing delays in the execution of state and federal criminal
 sentences.’” *Schriro v. Landrigan*, 550 U.S. 465, 473, 475 (2007) (quoting *Woodford v.*
Garceau, 538 U.S. 202, 206 (2003)). The AEDPA’s “‘highly deferential standard for
 evaluating state-court rulings’ . . . demands that state-court decisions be given the benefit of
 the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v.*
Murphy, 521 U.S. 320, 333 n.7 (1997)).

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim
 “adjudicated on the merits” by the state court unless that adjudication:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In conducting review under § 2254(d)(1), this Court “is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398-99 (2011).

DISCUSSION

I. DENIAL OF JURY TRIAL

Petitioner contends that he was denied his Sixth Amendment right to a jury determination on the factors that rendered him eligible for capital punishment, in violation of *Ring v. Arizona*. He argues that this denial amounted to structural error and, therefore, the Arizona Supreme Court’s decision to review for harmless error was contrary to or an unreasonable application of controlling federal law. Petitioner further contends that, even if subject to harmless error review, the Arizona Supreme Court’s finding of harmlessness was contrary to federal law and based on an unreasonable determination of the facts.

A. Harmless Error Standard

In *Ring*, the United States Supreme Court invalidated Arizona’s judge-only capital sentencing scheme by holding that a jury must determine the existence of facts rendering a defendant eligible for the death penalty. 536 U.S. at 609. Subsequently, the Arizona Supreme Court, in *State v. Ring*, 204 Ariz. 534, 552, 65 P.3d 915, 933 (2003) (“*Ring III*”), held that the Sixth Amendment “does not require automatic reversal of a death sentence imposed under [Arizona’s] former sentencing statutes.” Instead, relying on *Neder v. United States*, 527 U.S. 1, 8 (1999), and *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991), the court held that it would review capital sentences under the harmless error standard. *Id.* at 552-53, 65 P.3d at 933-34. Having rejected the argument that *Ring* error is structural, the Arizona Supreme Court applied the harmless error test in evaluating Petitioner’s death sentence. *Sansing II*, 206 Ariz. at 235, 77 P.3d at 33. This was not contrary to or an unreasonable application of clearly established federal law.

A structural error is a “defect affecting the framework within which the trial proceeds,

1 rather than simply an error in the trial process itself.” *Fulminante*, 499 U.S. at 310.
2 Structural error affects “the entire conduct of the trial from beginning to end.” *Id.* at 309.
3 The “very limited class of cases” in which structural error has been found feature “such
4 defects as the complete deprivation of counsel or trial before a biased judge,” which
5 “necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for
6 determining guilt or innocence.” *Neder*, 527 U.S. at 8 (finding that a jury instruction
7 omitting an element of the offense does not constitute structural error).

8 The United States Supreme Court has never held that *Ring* error is included in that
9 limited class of cases. In *Ring* itself, the Court declined to “reach the State’s assertion that
10 any error was harmless because a pecuniary gain finding was implicit in the jury’s guilty
11 verdict.” 536 U.S. at 609 n.7; *see id.* at 621 (Justice O’Connor dissenting) (“I believe many
12 of these challenges will ultimately be unsuccessful . . . because the prisoners will be unable
13 to satisfy the standards of harmless error.”). Subsequently, in *Schriro v. Summerlin*, holding
14 that *Ring* did not apply retroactively, the Court rejected claims that *Ring* was either a
15 substantive ruling or a “watershed rule[] of criminal procedure implicating the fundamental
16 fairness and accuracy of the criminal proceeding,” explaining that it could not “confidently
17 say that judicial factfinding so *seriously* diminishe[s] accuracy that there is a large risk of
18 punishing conduct the law does not reach.” 542 U.S. 348, 355-356 (2004) (internal
19 quotations omitted).

20 As the Arizona Supreme Court explained in *Ring III*, 204 Ariz. at 545, 554-55, 65
21 P.3d at 926, 935-36, the holding in *Ring* was preceded by, and premised on, the ruling in
22 *Apprendi v. New Jersey*, which held that “any fact that increases the penalty for a crime
23 beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond
24 a reasonable doubt.” 530 U.S. 466, 490 (2000). There is no question that *Apprendi* errors
25 are subject to harmless error analysis. *See Washington v. Recuenco*, 548 U.S. 212, 218-22
26 (2006) (holding that *Apprendi* errors are reviewed for harmlessness using the framework of
27 *Neder*); *see also United States v. Zepeda-Martinez*, 470 F.3d 909, 910 (9th Cir. 2006).

28 The Arizona Supreme Court did not unreasonably apply Supreme Court precedent

1 when it determined that harmless error was the appropriate standard of review. *Ring* error
2 does not affect the framework within which the trial proceeds or the entire conduct of the
3 trial, but only the trial process itself. The state court properly found that *Ring* error, like the
4 failure to instruct a jury on an element of the offense, was not so fundamental that it
5 necessarily rendered Petitioner's capital sentence unfair or unreliable.

6 **B. Harmless Error Analysis**

7 On direct appeal, the Arizona Supreme Court rejected Petitioner's argument that it
8 could not determine beyond a reasonable doubt that no jury would find the mitigating
9 circumstances sufficient to call for leniency. *Sansing*, 206 Ariz. at 241, 77 P.3d at 39.
10 Petitioner argues that the state court's harmless error analysis was unreasonable and contrary
11 to Supreme Court law.

12 Relevant Facts

13 Petitioner pled guilty on September 18, 1998, to all of the charged offenses. The plea
14 agreement provided that Petitioner could be sentenced on the first-degree murder count to
15 life imprisonment for a minimum of 25 years, life imprisonment without the possibility of
16 release, or death. (ROA doc. 61.) In a written factual basis statement accompanying the
17 plea, Petitioner admitted that he planned to rob the victim before her arrival and that he
18 struck her in the head with a wooden stick after detaining her in his home. (ROA doc. 60.)
19 He also admitted that the victim was conscious after he returned from moving her vehicle and
20 that he "knowingly engaged" in sexual intercourse with her without her consent while she
21 was bound and tied. Petitioner further stated that the victim was blindfolded, gagged, and
22 had two plastic bags placed over her head, and that he stabbed her in the abdomen.

23 Sentencing Proceedings

24 Sentencing took place one year after entry of the guilty plea. In its presentencing
25 memorandum, the State urged the trial court to find three aggravating factors: the (F)(5)
26 pecuniary gain factor, the (F)(6) heinous, cruel, or depraved factor, and the (F)(2) prior
27 serious offense factor. (ROA doc. 96 at 7-31.) At the aggravation/mitigation hearing, the
28 State proffered testimony from Detective Joseph Petrosino, Dr. Mark Fischione, and Kara

1 Sansing, Petitioner's wife. In addition, the parties jointly stipulated to admission of
2 audio/video taped interviews of Petitioner's four children as well as statements made by the
3 children to a counselor, Dr. Carol Ainley, in lieu of calling the children as witnesses. (Doc.
4 38-7 at 5.) The parties also stipulated to the admission of statements made by Petitioner to
5 a reporter, Victoria Harker, as well as DNA test results from (1) a vaginal swab of the victim
6 indicating the presence of Petitioner's semen, and (2) a carpet swatch from Petitioner's home
7 indicating the presence of the victim's blood. (*Id.* at 7-8.)

8 Det. Petrosino described the crime scene, including the numerous items that covered
9 the victim's body when it was found behind a shed in Petitioner's backyard. (RT 8/2/99 at
10 25-29.) He also described discovering in Petitioner's home a broken piece of a wooden club
11 in a sink cabinet and a rusty boning knife later identified by Kara Sansing as the one used by
12 Petitioner to stab Trudy Calabrese. (*Id.* at 45-49.) Dr. Fischione testified concerning the
13 victim's numerous injuries. He opined that she died as a result of multiple stab wounds to
14 her abdomen and blunt force head trauma. (RT 8/3/99 at 55.) He further testified that it was
15 possible Calabrese regained consciousness after receiving the head injuries but he "doubt[ed]
16 it." (*Id.* at 34.)

17 Kara Sansing, who pled guilty to first-degree murder in exchange for a life sentence
18 with the possibility of release after 25 years, testified to the events surrounding Calabrese's
19 death. On the day of the murder, Petitioner called her at work several times and at one point
20 said he had obtained and smoked some crack cocaine. (RT 8/2/99 at 55.) After returning
21 home from work, Kara smoked crack and waited with her husband for Calabrese to arrive
22 less than an hour later. She testified that her children could see her and Petitioner tie up the
23 victim, who kicked and struggled against the bindings and pleaded not to be hurt. (*Id.* at 64-
24 69.) Calabrese also repeatedly asked the Sansing children to call 911 and became
25 unconscious when Petitioner struck her in the head with a wooden club. Petitioner then
26 moved Calabrese's truck and upon returning dragged her to a bedroom and raped her. Kara
27 also testified that she heard Calabrese speak with Petitioner during the sexual assault. (*Id.*
28 at 78-79.) Afterward, Petitioner stabbed Calabrese with a knife and then used her jewelry

1 to twice buy crack from dealers who came to the house in the hours following the murder.
2 Kara also testified that she had been married to Petitioner for 14 years and that he was not
3 acting normal that day compared to previous times he took drugs. (RT 8/3/99 at 6-7.)

4 Each of Petitioner's children reported to investigators that their father grabbed the
5 victim from behind and held her down while their mother helped tie her up. (Doc. 38-5 at
6 6, 17-19; Doc. 38-6 at 9-10, 21.) In her report, Dr. Ainley stated that Petitioner's 12-year-old
7 son saw his father hit Calabrese with a wooden pole and that his parents would not let him
8 help her. (Doc. 38-7 at 5-6.) Dr. Ainley further stated that this son suffers from severe guilt
9 at having followed his father's direction to find an extension cord to bind the victim. (*Id.* at
10 7.) Petitioner's ten-year-old son described seeing his father break a stick on Calabrese's head
11 and wash one of the pieces before stashing it under the sink. (Doc. 38-6 at 6-7, 11.) The
12 children further told investigators that the victim prayed to God for help and asked them to
13 call 911. Dr. Ainley also relayed that each of the children reported seeing the victim in the
14 bedroom under a pile of clothes and again the next day behind the shed. (Doc. 38-7 at 7.)
15 In addition, two of the children told Dr. Ainley that their parents regularly used drugs. (*Id.*)

16 The parties stipulated that Victoria Harker, a reporter for the Arizona Republic, would
17 testify that Petitioner told her in January 1999 that he had not planned to rob or harm the
18 victim prior to her arrival at his house but decided to end her suffering after raping and
19 beating her so badly. (Doc. 38-7 at 8.) Petitioner also denied to Harker that his children
20 witnessed the attack but conceded that they may have seen Calabrese tied up and that she had
21 regained consciousness after he moved her truck. (*Id.*) Petitioner told Harker that once he
22 attacked the victim he "had to finish it up because I was going to jail anyway. . . . Once you
23 start something, you just can't stop." (*Id.* at 9.)

24 During the mitigation portion of the presentencing hearing, Petitioner proffered
25 statements and testimony from four witnesses: his wife Kara, his sister Patsy Hooper, his
26 mother Glenda Singh, and his brother Allan Sansing. Petitioner also made a statement, and
27 the parties stipulated that Petitioner was arrested peaceably at his sister's house after their
28 father called the police. (ROA doc. 90.)

1 Kara Sansing pleaded with the court to spare her husband's life. (RT 8/31/99 at 4.)
2 She reiterated her previous testimony that Petitioner was not acting normal, even under the
3 influence of drugs, on the day of the murder. (*Id.* at 8.) Patsy Hooper testified about the
4 close bond she shared with Petitioner, whom she said was the baby of the family and loved
5 by all. (*Id.* at 9.) She described the struggles he and his wife endured trying to raise four
6 children and how Petitioner visited her to confess the crime and wait to be arrested after she
7 asked their father to call the police. (*Id.* at 10-11.) She begged the court to spare his life,
8 noting that her brother was willing to take responsibility for what he had done while on drugs
9 and that his children would suffer if he was sentenced to death. (*Id.* at 11-12.)

10 Petitioner's mother stated that she had been a single mother, who worked hard as a
11 waitress to make enough money to feed and house her family. (*Id.* at 20.) She said her son
12 and his wife had been going to church and were doing well until drugs took over Petitioner's
13 life. (*Id.*) She acknowledged the wrongfulness of Petitioner's conduct, but asked that his life
14 be spared for the sake of his children. (*Id.* at 20-21.) Petitioner's brother told the court that
15 despite not being a close family, he loved his brother and hoped his life would be spared. (*Id.*
16 at 22.) He said that Petitioner was not a monster, that drugs led Petitioner to commit such
17 a horrific crime, and that life imprisonment would be sufficient punishment because
18 Petitioner was tormented daily by the knowledge of what he did to the victim and her family.
19 (*Id.* at 22-23.) He further said that he lived in the same room with Petitioner from age five
20 to 15 and that Petitioner did not have a violent side despite their hard life. (*Id.*)

21 Petitioner concluded the presentence hearing with a lengthy statement. He began with
22 an apology to the victim's family for his "really terrible" and "awful" acts. (*Id.* at 24-25.)
23 "[A]s I have said many times before to the media and also to the Court, that what I have done
24 deserves the death penalty but I ask for mercy from the Court to spare my life and give me
25 a chance to prove myself as a human being, not as a monster that people make me out to be."
26 (*Id.* at 25.) Petitioner acknowledged essentially asking for the death penalty at one point in
27 the process but realized after speaking with a jail psychiatrist that it would be better for his
28 wife and children if his life was spared. (*Id.* at 26.) Next, Petitioner addressed the victim's

1 husband directly and again apologized for the nightmare he created. (*Id.* at 27.) Petitioner
2 said he had been praying for the Calabrese family and that he pled guilty to spare them
3 additional pain. (*Id.* at 27-28.) Petitioner then addressed his own family, saying he did not
4 “blame no one or nothing in my past to lead to what I had done.” (*Id.* at 29.) He remarked
5 that everyone knew he had problems with drugs and wished the family “could have taken
6 some actions to get me the help I needed.” (*Id.*) However, he also acknowledged he “would
7 have refused it because drugs meant the world” to him. (*Id.*) Petitioner apologized for the
8 pain he caused his family, emphasized his love for them, and asked them to go along with
9 his desire to donate his organs should he be sentenced to death. (*Id.* at 30-31.) Finally,
10 Petitioner addressed his wife, stating that he probably would have hurt her had she not gone
11 along with his attack on the victim, that he was to blame for letting drugs take over his life,
12 and that he loved her deeply. (*Id.* at 32-33.) In conclusion, Petitioner told the judge he was
13 a new person now that he was off of drugs and asked that his life be spared for the sake of
14 his loved ones. (*Id.* at 34-35.)

15 Prior to sentencing, a mitigation specialist employed by the defense provided a
16 notebook of materials to the judge. These included a letter reporting Petitioner’s social
17 history, numerous photographs, school records, and articles about crack cocaine and
18 marijuana. (Doc. 44-3.) The report provided details of Petitioner’s genetic background,
19 developmental years, and criminal background. It stated that between the ages of six and ten,
20 Petitioner was exposed to weekly domestic abuse, fueled by his mother’s and stepfather’s
21 alcohol abuse. It further stated that at age 14 Petitioner was sent to a juvenile corrections
22 facility for breaking into a school while on probation and that testing there found him to be
23 functioning in the borderline IQ range. Available school records indicated that Petitioner
24 failed classes and quit school shortly after ninth grade. The report described Petitioner’s
25 abusive relationship with his wife and their drug addiction, asserting that they attempted to
26 quit and sought help from family members and their church but relapsed shortly before the
27 offense. According to the mitigation specialist, at the time of the murder, Petitioner and his
28 wife had been on a four-day crack cocaine binge. In conclusion, the report asked the court

1 to sentence Petitioner to life without the possibility of parole based on his genetics, childhood
2 environment, cooperation with authorities, genuine remorse, and the influence of drugs
3 during the offense.

4 In a presentencing memorandum, defense counsel refuted application of the State's
5 alleged aggravating factors and urged the trial court to find that the proffered mitigation
6 outweighed any aggravation. (ROA doc. 97.) With regard to statutory mitigating factors,
7 counsel argued that Petitioner's capacity to appreciate the wrongfulness of his conduct or to
8 conform his conduct to the requirements of law was significantly impaired by the abuse of
9 alcohol and crack cocaine. *See* A.R.S. § 13-703(G)(1). Counsel also argued that Petitioner's
10 31 years of age was a mitigating factor under § 13-703(G)(5) because he lacked intelligence,
11 as indicated by his poor academic history and the "lack of planning" and "unsophisticated
12 approach" to the crime. (ROA doc. 97 at 15.) In the event the court did not find the
13 existence of significant impairment and age under (G)(1) and (G)(5), counsel asked the court
14 to nonetheless find them to be non-statutory mitigating factors.

15 Defense counsel also urged numerous other non-statutory mitigating factors, asserting
16 that Petitioner had a difficult childhood, grew up in a dysfunctional family, and witnessed
17 significant abuse during his formative years. (ROA doc. 97 at 15.) Counsel noted
18 Petitioner's low intelligence and lack of education. (*Id.* at 16.) Counsel argued that
19 Petitioner did not have a violent character or history and would not likely be a future danger,
20 especially in the controlled setting of a prison; that Petitioner's pleading guilty and accepting
21 responsibility demonstrated that he had potential for rehabilitation; and that as a result of
22 Petitioner's reflection on his actions he was committed to changing his behavior for the
23 better. (*Id.* at 16-17.) Counsel emphasized that Petitioner's family loved and supported him,
24 despite what he had done, and that Petitioner's children in particular would be devastated if
25 he were sentenced to death. (*Id.* at 17-18.) Counsel also noted that the victim's husband had
26 not requested the death penalty and that her ten-year-old daughter expressly asked that
27 Petitioner not be sentenced to death. (*Id.* at 18.)

28 Finally, counsel addressed Petitioner's remorse, observing that Petitioner "has

1 accepted full responsibility for his conduct and expressed deep and genuine remorse for his
2 actions almost from the beginning of this litigation.” (*Id.* at 18.) Counsel continued:

3 This was never a part of any strategy to seek leniency from this Court. As
4 counsel told the Court at the time of the change of plea in September of 1998,
5 John Sansing told his lawyers at their second visit, just a few days after his
6 arrest, that “There isn’t going to be a trial . . . I am responsible for what I have
7 done . . . I’m not going to put the victim’s family or my children through a
8 trial.”

9 From that day forward, John Sansing expressed a desire to public [sic]
10 apologize to the victim’s family and plead guilty to what he had done. It was
11 counsel undersigned who delayed the process until September of 1998, so that
12 they could investigate the case and properly advise the defendant of his
13 options. John Sansing on numerous occasions expressed his frustration with
14 his counsel about the delay in going to court and pleading guilty.

15 Counsel undersigned has had numerous conversations with John
16 Sansing since February of 1998. We believe that his remorse and acceptance
17 of responsibility are complete and absolutely genuine. He has spoken with
18 deep regret about the pain and suffering that he has caused the Calabrese
19 family and the trauma that he has caused to his own children.

20 (*Id.* at 18-19.) In support, counsel appended to their memorandum the transcript from a
21 November 1998 sentencing status conference during which Petitioner apologized for his
22 actions, explained why he pled guilty, minimized his wife’s involvement, and stated that he
23 was willing to accept the death penalty. (RT 11/24/98 at 3-7.) Counsel concluded by noting
24 that Petitioner’s level of remorse and acceptance of responsibility were, in their experience,
25 unique for this type of case and asked that these factors be given substantial mitigating
26 weight. (*Id.* at 19-20.)

27 Prior to sentencing Petitioner sent two letters to the trial judge. In the first, Petitioner
28 requested an opportunity to speak with his wife about their children and to physically say
29 goodbye to her and other family members. He also noted his willingness to accept the death
30 penalty if the court believed that to be the appropriate punishment. In the second, Petitioner
31 requested that his sentencing be postponed a few days while he figured out how to donate his
32 organs.

33 A presentence report (PSR) was also prepared by the court’s probation department.
34 (ROA doc. 101.) On the advice of counsel, Petitioner declined to discuss his background,
35 substance abuse issues, or the offense, and the PSR writer noted that defense counsel would

1 be providing that information directly to the court. The PSR did include a statement from
2 Petitioner's sister, Patsy Hooper, who opined that drugs influenced Petitioner's actions and
3 that he was remorseful. In addition, the victim's husband stated that he would agree with any
4 sentence the judge chose to hand down.

5 Sentencing took place on September 30, 1999. Prior to imposition of sentence,
6 Petitioner made another statement, again apologizing, expressing remorse, and asking that
7 his organs be donated if sentenced to death. (RT 9/30/99 at 3-5.) The court indicated that
8 it had considered the evidence presented at the aggravation/mitigation hearing, the parties'
9 written memoranda, and the written mitigation materials proffered by the defense. (*Id.* at 6-
10 7.) The court also indicated that it had not considered any information contained in the PSR
11 or any victim impact statements in determining the existence or nonexistence of aggravating
12 factors, but did consider the PSR to determine the existence of mitigating circumstances. (*Id.*
13 at 7.)

14 Regarding aggravation, the trial court rejected the State's argument that Petitioner's
15 contemporaneous convictions for kidnapping, sexual assault, and robbery of the victim
16 constituted a prior "serious offense" for purposes of A.R.S. § 13-703(F)(2). However, the
17 court agreed with the State that the evidence established beyond a reasonable doubt that
18 Petitioner committed the offense for pecuniary gain under § 13-703(F)(5) and that the murder
19 was committed in an "especially heinous, cruel, or depraved" manner under § 13-703(F)(6).
20 For the latter, the court found both (F)(6) prongs—that the killing was cruel as well as
21 heinous and depraved.

22 In finding that the murder was especially cruel, the court first determined that the
23 victim "suffered unimaginable mental anguish during the approximately one hour or more
24 that she was held hostage prior to her death." (RT 9/30/99 at 11.) Citing the testimony of
25 Kara Sansing, as well as the Sansing children's statements to the police and Dr. Ainley, the
26 court found that the victim had prayed to God and pleaded with them to call 911. (*Id.* at 11-
27 12.) The court further noted that both Petitioner, in an interview with a newspaper reporter,
28 and his wife stated that the victim had regained consciousness before Petitioner raped her.

1 This also established “beyond a reasonable doubt that Trudy Calabrese suffered
2 extraordinary mental anguish, including uncertainty as to her ultimate fate.” (*Id.* at 13.)

3 Second, the court found cruelty based on its determination that the victim consciously
4 suffered severe physical pain prior to her death and that the defendant knew or should have
5 known she would suffer. In support, the court referenced ligature wounds and bruises on the
6 victim’s wrists and ankles, defensive wounds to her hands, trauma to her face, and “two deep
7 blows to the back her head, which caused bruising of the brain and hemorrhaging.” (*Id.*)
8 Although the court agreed the victim likely passed out from the head blows, it found that she
9 regained consciousness before the rape and was then stabbed three times in the abdomen with
10 a rusty knife. (*Id.*) Citing the medical examiner’s testimony, the court found that it would
11 have taken several minutes to die from the loss of blood caused by the stab wounds. (*Id.* at
12 14.) Finally, the court referenced Petitioner’s own statement to a reporter that he killed the
13 victim to end her suffering as proof she was consciously suffering severe physical pain. (*Id.*)

14 In finding that the murder was committed in an especially heinous or depraved
15 manner, the court determined that Petitioner inflicted gratuitous violence, that the victim was
16 helpless, and that the killing was senseless. *See State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1
17 (1983) (identifying factors to be considered in determining whether a killing is heinous or
18 depraved). In finding gratuitous violence, the court stated that Petitioner hit the victim “so
19 hard with the club that it broke in two pieces. He hogtied her ankles and wrists and brutally
20 sexually assaulted her. Finally, he stabbed her, not once but three times, even grinding the
21 rusty butcher knife into her as witnessed by Kara Sansing.” (RT 9/30/99 at 15.) As to the
22 other factors, the court stated that the victim “was rendered utterly and completely helpless
23 by the defendant’s surprise attack” and that the killing was senseless because it “was
24 completely unnecessary in order for the defendant to accomplish his goal of robbing Trudy.”
25 (*Id.* at 16.)

26 Turning to mitigation, the court found it likely that Petitioner was impaired or affected
27 by his crack cocaine usage at the time of the murder. However, it did not find that this
28 established by a preponderance of the evidence that Petitioner’s capacity to appreciate the

1 wrongfulness of his conduct or to conform his conduct to the requirements of the law was
2 *significantly* impaired, pursuant to A.R.S. § 13-703(G)(1). (RT 9/30/99 at 17-18.) In making
3 this determination, the court noted that Petitioner “devised and carried out a plan to lure a
4 Good Samaritan to his home and then rob her,” consciously sought to hide her truck, and
5 concealed her body to avoid detection. (*Id.* at 18.) The court also rejected the (G)(5) age
6 factor, finding that Petitioner was a 31-year-old married father of four who had been living
7 an adult lifestyle for many years. (*Id.* at 19.)

8 With regard to non-statutory mitigating factors, the court again declined to find that
9 Petitioner had established age as a mitigator and ruled that the victim’s daughter’s
10 recommendation of leniency was not a mitigating circumstance. (*Id.* at 20, 23.) The court
11 also found that Petitioner had failed to prove by a preponderance of the evidence that he had
12 changed his life, would not be a future danger, or had potential for rehabilitation. (*Id.* at 22.)

13 In support of mitigation, the court determined that although Petitioner did not establish
14 significant impairment under (G)(1), Petitioner’s capacity to conform his conduct to the law’s
15 requirements was somewhat impaired by his use of crack cocaine. The court also found that
16 Petitioner had proven by a preponderance of the evidence that he had a difficult childhood
17 and family background. In support, the court noted that Petitioner’s parents were divorced
18 shortly after his birth, he had virtually no relationship with his father, his early developmental
19 years were chaotic, his mother married three more times, and when he was six to ten years
20 of age, his mother and stepfather abused alcohol and he was exposed to weekly episodes of
21 domestic abuse by his stepfather upon his mother. (*Id.* at 20-21.) Although the court found
22 the existence of a difficult childhood as a mitigating factor, it determined this circumstance
23 was not entitled to significant mitigating weight due to the lack of a causal link between
24 Petitioner’s background and the crime. (*Id.* at 21.)

25 The court further found as mitigating that Petitioner had accepted responsibility for
26 his actions, was genuinely remorseful, and entered a guilty plea to avoid putting the victim’s
27 family and his children through a trial. (*Id.*) In addition, the court found that Petitioner
28 presented sufficient evidence to establish a lack of education, but determined this had only

1 minimal mitigating weight. (*Id.* at 22.) Finally, the court found that Petitioner established
 2 by a preponderance of the evidence that he had the love and support of his family but
 3 assigned it only minimal weight because it did not prevent Petitioner from committing the
 4 crime or victimizing his own children. (*Id.*)

5 In determining that the proven mitigation did not outweigh the aggravation, the court
 6 considered the mitigating circumstances both individually and cumulatively. (*Id.* at 23.) It
 7 further found that even considering all of the proposed mitigating factors, they would be
 8 insufficient to call for leniency “when balanced against the especially cruel manner in which
 9 defendant murdered Trudy Calabrese.” (*Id.* at 24.) The court explained:

10 The infliction of such grotesque, emotional and physical pain to a
 11 woman who, with all the hate, violence and lack of compassion we see, stood
 12 out like a shining light, as a true Samaritan, is shockingly evil. Throughout her
 ordeal, enveloped in defendant’s drugged out and twisted plan of greed and
 violence, Trudy Calabrese kept her faith in God to the end.

13 The surprise attack on this good woman, followed by being beaten with
 14 a club defendant eventually broke in two on her head, then brutally stripped of
 her dignity as she was raped, and finally being stabbed three times, all together
 resulted in a terror-filled and horrible murder.

15 (*Id.*)

16 On appeal, the Arizona Supreme Court found insufficient evidence to establish that
 17 the murder was committed “to facilitate the taking of or ability to retain items of pecuniary
 18 value.” *Sansing I*, 200 Ariz. at 354, 26 P.3d at 1125. However, on independent review after
 19 striking the pecuniary gain aggravating factor, it found that the murder was especially cruel
 20 and that the mitigation was insufficient to call for leniency.

21 *Harmless Error Review*

22 In conducting its harmless error review following *Ring*, the Arizona Supreme Court
 23 considered the (F)(6) aggravating factor found at sentencing and upheld on appeal—that the
 24 murder was committed in an especially heinous, cruel, or depraved manner. The court
 25 explained that the State needed to prove only one of the (F)(6) elements. *Sansing II*, 206
 26 Ariz. at 235, 77 P.3d at 33.

27 The court first determined that cruelty was established in three independent ways: (1)
 28

1 the victim suffered mental anguish, as evidenced by the victim's defensive wounds, pleas for
2 help, and attempts to resist the attack; (2) the victim suffered both mental and physical
3 suffering when she was raped while her arms and legs were bound; and (3) the victim
4 endured physical pain, as demonstrated by the multiple injuries to her head and abdomen,
5 none of which caused immediate death. *Id.* at 235-36, 77 P.3d at 33-34. The court rejected
6 Petitioner's argument that the evidence was inconclusive as to whether the victim was
7 conscious during all portions of the attack, citing Petitioner's own admissions, including to
8 a reporter, as well as his wife's testimony. *Id.* at 237, 77 P.3d at 35. The court concluded
9 beyond a reasonable doubt that any reasonable jury would have found that the murder was
10 committed in an especially cruel manner, and it was thus harmless error for the trial court to
11 have determined the existence of this aggravating factor.

12 The court then determined that heinousness and depravity were established by
13 "[o]verwhelming and uncontroverted evidence" that Petitioner inflicted gratuitous violence
14 upon a helpless victim. *Id.* It concluded that the "rape, facial wounds, neck ligatures,
15 gagging, blind-folding, and grinding of the knife constitute[d] violence beyond that necessary
16 to kill," and that the victim, having been bound by both her wrists and ankles, which were
17 then tied together, was helpless to defend herself. *Id.* at 238, 77 P.3d at 36. The court found
18 beyond a reasonable doubt that any reasonable jury would have concluded that Petitioner
19 inflicted gratuitous violence upon a helpless victim and that consequently the murder was
20 especially heinous. *Id.*

21 Next, the court considered whether the mitigating evidence was sufficiently
22 substantial to call for leniency. The court first assessed the evidence concerning A.R.S. § 13-
23 703(G)(1), which provides a mitigating circumstance where "[t]he defendant's capacity to
24 appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of
25 law was significantly impaired, but not so impaired as to constitute a defense to prosecution."
26 *Id.* at 239, 77 P.3d at 37. Like the trial court, the supreme court found that this factor had not
27 been proved:

28 No reasonable jury would have concluded that Sansing met his burden

1 to establish that his ability to control his behavior or his capacity to appreciate
2 the wrongfulness of his conduct was significantly impaired. Sansing presented
3 no expert testimony to support his assertion that his use of cocaine impaired
4 either his capacity to control his conduct or his capacity to appreciate the
5 wrongfulness of his actions. He therefore failed entirely to show any causal
6 nexus between his alleged drug use and impairment.

7 Sansing also presented only minimal testimony about his drug use on
8 the day of the murder. Kara testified that Sansing telephoned her while she
9 was work at approximately 1:30 p.m. During this conversation, Sansing
10 informed her that he had purchased some crack cocaine. He told her that he
11 had smoked some of the crack but was saving the rest for her. Kara testified
12 that she could tell he had ingested the crack from the sound of his voice. She
13 testified that when she returned home from work several hours later, Sansing
14 was not "acting normal." However, she also testified that Sansing's actions
15 were thought out and that he was not acting as if he were in a trance.

16 That evidence is insufficient to establish, by a preponderance of the
17 evidence, that Sansing's capacity to control his behavior was significantly
18 impaired. First, Kara did not quantify how much crack Sansing used.
19 Moreover, no reasonable jury would conclude that Kara's testimony that
20 Sansing was not acting himself was sufficient to establish that his capacity was
21 significantly impaired.

22 Furthermore, Sansing's deliberate actions refute his impairment claim
23 and establish that the drug use did not overwhelm Sansing's ability to control
24 his conduct. Kara testified that Sansing planned to rob the person who
25 delivered the food. Additionally, Sansing contacted two different churches in
26 his attempt to lure an unsuspecting victim to his home.

27 Sansing's impairment argument fails on yet another basis. Sansing
28 admitted and stipulated to facts that leave no doubt that he attempted to avoid
detection. After beating and hog-tying Trudy, Sansing left and moved her
truck away from the apartment. When Pastor Becker called the Sansing home,
inquiring about Trudy's whereabouts, Sansing gave him a false address and
told him that Trudy never arrived. Additionally, Sansing's ten-year-old son
told the police Sansing washed blood from the club that he used to strike
Trudy. These steps, which can only be regarded as part of an attempt to avoid
detection, negate any possibility that a reasonable jury would find that
Sansing's capacity to appreciate the wrongfulness of his conduct was
significantly impaired.

Id. at 239-40, 77 P.3d at 37-38 (citations omitted). The court further found beyond a
reasonable doubt that any reasonable jury would have rejected Petitioner's age as a statutory
mitigating circumstance.

The court then proceeded to examine the non-statutory mitigating circumstances
found by the trial court. For the same reasons the court determined that the (G)(1)
impairment factor would not have been found, the court reasoned that no reasonable jury
could have accorded Petitioner's impairment more than minimal weight as a non-statutory

mitigating factor. *Id.* at 240-41, 77 P.3d at 38-39. The court further concluded that although a jury “might have concluded that Sansing established a difficult, although not abusive, childhood and lack of education,” it would have accorded these factors only minimal weight because Petitioner had failed to demonstrate any causal link between them and the crime. *Id.* at 241, 77 P.3d at 39. Next, the court assumed that “a reasonable jury would have accorded some weight to Sansing’s family’s love and support and to the fact that he accepted responsibility for his crime.” *Id.* Lastly, the court determined that no reasonable jury could have given more than minimal weight to Petitioner’s claim that he presents no future threat and that a jury could not have considered the victim’s daughter’s request that he be given a life sentence because such evidence is not proper mitigation. *Id.*

The Arizona Supreme Court concluded its harmless error review as follows:

The evidence leaves no doubt that Sansing murdered Trudy Calabrese in an especially cruel, heinous, or depraved manner. The brutality of this murder clearly sets it apart from the norm of first degree murders. Collectively, the mitigating evidence is minimal at most. We conclude beyond a reasonable doubt that any reasonable jury would have concluded that the mitigating evidence was not sufficiently substantial to call for leniency. Accordingly, we hold the [*Ring*] violation constituted harmless error.

Id.

Analysis

Petitioner is entitled to relief on this aspect of Claim 1 only if the Arizona Supreme Court’s ruling was “in conflict with the reasoning or the holdings of [Supreme Court] precedent” or if it “applied harmless-error review in an ‘objectively unreasonable’ manner.” *Mitchell v. Esparza*, 540 U.S. 12, 17, 18 (2003) (per curiam) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75-77 (2003)); *see also Fry v. Pliler*, 551 U.S. 112, 119 (2007) (“In *Mitchell v. Esparza*, we held that, when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable.”). He is not entitled to relief if the state court “simply erred” in concluding that the *Ring* error was harmless. *Esparza*, 540 U.S. at 18.

Petitioner first argues that the Arizona Supreme Court’s determination that the victim was conscious, upon which he asserts its finding of cruelty rests, was based upon an

1 unreasonable determination of the facts. (Doc. 35 at 42-44.) He contends that the evidence
2 was inconclusive in light of the medical examiner's doubt about the victim regaining
3 consciousness after the head injuries, the alleged unreliability of Kara Sansing's statements,
4 and questions concerning the voluntariness of the written factual basis supporting Petitioner's
5 plea. (*Id.*) However, the latter two allegations are based on evidence that was not part of the
6 record on appeal to the Arizona Supreme Court. Under AEDPA, this Court must consider
7 whether the state court's decision "was based on an unreasonable determination of facts *in*
8 *light of the evidence presented in the State court proceeding.*" 28 U.S.C. § 2254(d)(2)
9 (emphasis added); *see also Pinholster*, 131 S. Ct. at 1398-99 (limiting review under §
10 2254(d)(1) "to the record that was before the state court that adjudicated the claim on the
11 merits").

12 Petitioner alleges that Kara Sansing's statement to police regarding an exchange
13 between Petitioner and the victim during the rape is "completely unbelievable." (Doc. 35 at
14 43.) He acknowledges, however, that evidence of the actual exchange was not admitted
15 during the sentencing proceeding. During her testimony, Kara initially denied hearing the
16 victim speak and was then impeached with her statement to police concerning the fact the
17 victim had spoken. However, in doing so, the prosecutor directed her not to repeat the
18 content of the conversation she overheard. (RT 8/2/99 at 78.) That this evidence was not
19 before the state court is confirmed by Petitioner's motion for evidentiary development, in
20 which he seeks to expand the record to include Kara Sansing's statement to police, arguing
21 it is relevant to demonstrate the unreliability of her testimony regarding consciousness. (Doc.
22 53 at 21.) Similarly, Petitioner's allegation concerning involuntariness of the factual basis
23 of his plea was not developed until his state PCR proceedings and thus was not before the
24 Arizona Supreme Court when it conducted its harmless error review. Accordingly, the Court
25 does not consider either of these allegations in determining under AEDPA the reasonableness
26 of the state court's ruling.

27 Looking at the record that was before the state court, this Court cannot say that its
28 finding of fact as to consciousness was objectively unreasonable. Petitioner admitted in the

1 factual basis for the plea that the victim was conscious when he raped her and also stipulated
2 that he told a reporter the victim had regained consciousness when he returned from moving
3 her truck. Petitioner's wife also testified that she heard the victim speak during the rape, and
4 Petitioner told the reporter that he decided to kill the victim because she was suffering. The
5 Arizona Supreme Court considered the medical examiner's speculation about the victim's
6 consciousness but found the direct evidence uncontroverted. This was not an unreasonable
7 determination of fact.

8 Moreover, Arizona law provides that a victim need not be conscious for "each and
9 every wound" inflicted for cruelty to apply. *Sansing*, 206 Ariz. at 235, 77 P.3d at 33 (citation
10 omitted). There is no dispute that Trudy Calabrese was conscious when she was grabbed
11 from behind, thrown to the ground, and hogtied. She sustained numerous defensive wounds
12 and other injuries during her struggle, pleaded for help, and prayed to God. The Arizona
13 Supreme Court's finding of cruelty based on the victim's mental anguish as to her fate while
14 she struggled with her attackers was not objectively unreasonable. This alone was sufficient
15 under state law to sustain the cruelty factor, regardless of whether the victim was conscious
16 during the rape and stabbing.

17 Petitioner further contends that the court's cruelty analysis is unreasonable when
18 compared with its decisions in other *Ring*-remand cases. However, to the extent that his
19 argument is based on a comparison with the analyses undertaken in other cases, Petitioner's
20 critique of the Arizona Supreme Court's cruelty finding in his case is unavailing. The fact
21 that the court did not find cruelty beyond a reasonable doubt in other cases, each of which
22 involved distinct facts and circumstances, does not demonstrate that the same court's ruling
23 in Petitioner's case was objectively unreasonable.

24 Petitioner next argues that the Arizona Supreme Court unreasonably found that the
25 murder was especially heinous. He asserts that the evidence was insufficient to establish
26 beyond a reasonable doubt that Petitioner inflicted gratuitous violence because "it was
27 impossible to determine which of the three stab wounds were fatal." (Doc. 35 at 47.)
28 However, the state court's determination was not based solely on the stab wounds. Rather,

1 it cited the numerous injuries sustained by the victim, including to her forehead, left orbital
2 region, and mouth, as well as the rape, neck ligatures, gagging, blindfolding, and grinding
3 of the knife as constituting violence beyond that necessary to kill. *Sansing*, 206 Ariz. at 238,
4 77 P.3d at 36. The state court's finding as to gratuitous violence was not based on an
5 unreasonable determination of the facts in light of the evidence.

6 Lastly, Petitioner criticizes the court's assessment of the mitigating evidence. This
7 criticism is unwarranted. The Supreme Court in *Ring* held only that a jury must determine
8 the aggravating factors in a capital case that render a person eligible for the death penalty;
9 it did not require jury determination of the ultimate sentence. Therefore, the Arizona
10 Supreme Court's review of *Ring* error was complete when it determined beyond a reasonable
11 doubt that no rational jury would have found that the (F)(6) aggravating factor had not been
12 proved. *Cf. Butler v. Curry*, 528 F.3d 624, 648-49 (9th Cir. 2008) (reviewing *Apprendi*
13 violation for harmless error by asking whether jury would have found aggravating factor
14 rendering defendant eligible for increased sentence). To the extent the Arizona Supreme
15 Court chose to include review of mitigation as part of its harmless error analysis, it did so as
16 a matter of state law. Furthermore, the court's review of the mitigating evidence, while not
17 required by *Ring*, was thorough, and its assessment of the evidence was not objectively
18 unreasonable. Petitioner's argument that the court improperly imposed a causal nexus on its
19 consideration of the mitigating evidence is discussed as part of Claim 7 in Section IV.A
20 below.

21 C. Conclusion

22 The Arizona Supreme Court did not unreasonably apply United States Supreme Court
23 precedent when it determined that harmless error was the appropriate standard of review for
24 *Ring* error. In addition, the state court's harmless error analysis in this case neither conflicted
25 with controlling Supreme Court law nor was applied in an objectively unreasonable manner.
26 Because Petitioner is precluded from relief by § 2254(d), the Court declines to expand the
27 record to include new evidence allegedly refuting the state court's finding as to the
28 consciousness of the victim when she was sexually assaulted and stabbed.

II. VOLUNTARINESS OF PLEA

In Claim 8, Petitioner argues that his guilty plea was not knowing, intelligent, or voluntary because the written factual basis established an aggravating factor and he did not waive his privilege against self-incrimination for the penalty phase. He asserts that he was unaware his admission concerning the victim's consciousness would be used to establish cruelty under A.R.S. § 13-703(F)(6) and that the trial court failed to explain the consequences this admission would have at sentencing.

Relevant Facts

Petitioner's written plea agreement included a summary of the rights waived by pleading guilty, including the privilege against self-incrimination. (ROA doc. 61.) The signed plea agreement did not give Petitioner any benefits in terms of sentencing, but did provide that the State would dismiss charges filed against Petitioner in a separate action.⁴ (*Id.*) Before accepting Petitioner's plea, the court first determined that Petitioner was mentally competent. (RT 9/18/08 at 2-3). The court then engaged Petitioner in a personal colloquy that included ascertaining whether Petitioner had read and understood the plea agreement, including the paragraph setting forth the constitutional rights he was giving up by pleading guilty. (*Id.* at 6-7.)

After Petitioner entered his guilty plea, the court read the factual basis signed by Petitioner and counsel, asking if the facts were true and if the statement accurately recounted the offense; Petitioner replied affirmatively to both inquiries. (*Id.* at 8-11.) The prosecutor then sought to orally add several additional facts, including that the victim suffered severe blows to the head, that semen found inside the victim was determined to contain DNA matching Petitioner, and that a different charitable organization had delivered a food box to Petitioner's home the day before the offense. (*Id.* at 11.) Petitioner disputed only the latter assertion that he had received an earlier food box. (*Id.* at 11-12.)

⁴ Although not apparent on the face of the agreement, Respondents assert that this separate matter involved four counts of child abuse.

1 In his PCR petition, Petitioner argued that he would not have pled guilty had he
2 understood the sentencing consequences of the factual admissions accompanying the plea.
3 (Doc. 38-10 at 24-27.) In support, he appended an affidavit attesting that at the time of the
4 plea he was unaware that (1) the State would have to prove aggravating factors to render him
5 eligible for the death penalty; (2) the victim's consciousness would be relevant to a finding
6 of cruelty; and (3) the admission regarding consciousness was not a necessary component
7 of the guilty plea. (Doc. 39-7 at 14-15.) Petitioner also denied that the victim was in fact
8 conscious after he moved her truck and claimed that he lied about this fact because he feared
9 being attacked by other inmates for having sexually assaulted the victim and thought "it
10 would be better if she was conscious during my assault." (*Id.* at 15-16.)

11 The state PCR court denied relief without explanation, stating that the claim failed to
12 present "a material issue of fact or law." (Doc. 38-9 at 29.) The Arizona Supreme Court
13 summarily denied review.

14 Analysis

15 When a state court does not explain its reasons for denying relief, a reviewing habeas
16 court must determine what arguments or theories could have supported the state court's
17 decision and "then it must ask whether it is possible fairminded jurists could disagree that
18 those arguments or theories are inconsistent with the holding in a prior decision" of the
19 Supreme Court. *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). The burden is on
20 Petitioner to show "there was no reasonable basis for the state court to deny relief." *Id.* at
21 784.

22 Due process requires that a defendant's guilty plea be voluntary and intelligent.
23 *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Because a guilty plea waives the rights
24 against self-incrimination, to trial by jury, and to confront one's accusers, its acceptance
25 requires that the accused "has a full understanding of what the plea connotes and of its
26 consequence." *Id.* at 244. "Among other circumstances, a plea of guilty can be voluntary
27 only if it is 'entered by one fully aware of the *direct* consequences' of his plea." *Carter v.*
28 *McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1986) (quoting *Brady v. United States*, 397 U.S.

1 742, 755 (1970)) (emphasis in original). This includes being advised of the “range of
2 allowable punishment” that will result from the plea. *U.S. ex rel. Pebworth v. Conte*, 489
3 F.2d 266, 268 (9th Cir. 1974).

4 The Ninth Circuit has held that “although a defendant is entitled to be informed of the
5 direct consequences of the plea, the court need not advise him of all the possible collateral
6 consequences.” *Torrey v. Estelle*, 842 F.2d 234, 235 (9th Cir. 1988) (internal quotation
7 omitted). “The distinction between a direct and collateral consequence of a plea turns on
8 whether the result represents a definite, immediate and largely automatic effect on the range
9 of the defendant’s punishment.” *Id.* at 236 (internal quotation omitted). Under this standard,
10 direct consequences include a mandatory parole term, ineligibility for parole, and the
11 maximum punishment provided by law. *Id.* A consequence is generally “collateral” if it
12 does not derive automatically as a result of the plea, but rather results from some
13 discretionary decisionmaking proceeding, such as whether a defendant’s sentences may run
14 consecutively or the possibility of parole revocation. *Id.*

15 Petitioner argues that the failure to inform him of the sentencing-related consequences
16 attendant to his admission in the plea’s factual basis renders the plea involuntary. However,
17 the trial court’s aggravation findings were not a *direct* consequence of the plea, but rather the
18 result of a separate, discretionary proceeding during which Petitioner retained all his
19 constitutional rights and the burden was on the prosecution to establish aggravating factors
20 beyond a reasonable doubt. Petitioner did not admit the existence of the (F)(6) aggravating
21 factor in his plea, and the trial court was under no obligation to find this factor proven
22 beyond a reasonable doubt. That Petitioner admitted facts from which the judge ultimately
23 found the (F)(6) factor is not the same as stipulating to the existence of the factor. *Cf. Adams*
24 *v. Peterson*, 968 F.2d 835, 839 (9th Cir. 1992) (en banc) (“A stipulation to facts from which
25 a judge or jury may *infer* guilt is simply not the same as a stipulation *to* guilt, or a guilty
26 plea.”). Because Petitioner’s plea had only collateral consequences on the aggravation phase
27 of sentencing, no constitutional violation arose out of the court’s failure to advise Petitioner
28 of the possibility he would be found eligible for the death penalty as a result of the

admissions contained in the plea's factual basis. Petitioner has failed to show that there was no reasonable basis for the state court to deny relief on this claim.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner contends that he was denied his Sixth Amendment right to the effective assistance of counsel when counsel failed to investigate and present mitigating evidence (Claim 2), investigate and rebut the (F)(6) "heinous, cruel, or depraved" aggravating factor (Claim 3), and properly advise him about the consequences of his plea, stipulated factual basis, and sentencing stipulation (Claim 4). Petitioner also asserts cumulative prejudice from counsel's alleged deficient performance (Claim 5).

A. Failure to Investigate and Present Mitigating Evidence

Petitioner alleges that sentencing counsel failed to competently investigate and present substantial mitigating evidence. He further alleges that counsel failed to select competent mental health and substance abuse experts and provide them with his social history. Petitioner argues that competent experts would have explained how mental disorders and substance abuse played a role in the commission of the offense and, consequently, would have established the (G)(1) substantial impairment mitigating factor. (Doc. 35 at 53.) Respondents concede exhaustion except to the extent Petitioner alleges that counsel was ineffective for failing to retain a neuropsychologist. It appears to this Court from its review of the PCR record, including the evidence and arguments presented during the state court evidentiary hearing, that the entirety of Claim 2 was exhausted.

Relevant Facts

Petitioner was represented at sentencing by Maricopa County Deputy Public Defenders Emmet Ronan and Sylvina Cotto. During PCR proceedings, Petitioner alleged that counsel provided constitutionally ineffective representation by failing to investigate and present substantial mitigating evidence and failing to provide Petitioner's social history to competent mental health and substance abuse experts. (Doc. 38-10 at 11.) The PCR court found this to be a colorable claim and held a four-day evidentiary hearing in January 2010.

At the hearing, Petitioner called as witnesses two of his siblings, four experts, trial

1 counsel Ronan, and mitigation specialist Pamela Davis. The State presented testimony from
2 a psychologist. In addition, the parties stipulated to admission of deposition transcripts, in
3 lieu of live testimony, from co-counsel Cotto and a mental health expert who evaluated
4 Petitioner before sentencing. (Doc. 43-10 at 21.) The parties also agreed to the admission
5 of numerous exhibits, including the 1989 American Bar Association Guidelines for the
6 Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines), pre-
7 sentencing psychological reports, post-conviction expert reports, and a 1986 psychological
8 evaluation. (Doc. 43-9 at 2-3.)

9 *Evidence Regarding Counsel's Investigation*

10 Mitigation specialist Davis testified that she began working as a non-capital mitigation
11 specialist for the Maricopa County Public Defender in 1991, after having worked more than
12 five years in adult probation departments. (Doc. 39-9 at 12.) Before being recruited by
13 Ronan to assist in Petitioner's case, she had worked on only one capital case. Davis recalled
14 meeting frequently with Petitioner at the jail and traveling to Alabama, Nevada, and Utah to
15 interview family members and obtain records. Davis said she did not meet with any of the
16 experts retained by counsel to evaluate Petitioner and did not know whether they were given
17 any of the background information she had compiled. (*Id.* at 20-21.) However, Davis also
18 testified that at the time she began working on Petitioner's case in 1998, mitigation
19 specialists were not commonly used in capital cases and she believed her role was to compile
20 a written social history for presentation to the court, not to recommend experts to counsel.
21 (*Id.* at 37-38.) Trial counsel Ronan also testified that in 1999 the concept of a capital
22 mitigation specialist was new in his public defender office. (Doc. 40-6 at 11-12.)

23 Petitioner's brother, Allen Sansing, and one of his sisters, Susan Mitchell, testified
24 that they recalled meeting jointly with Davis in Alabama prior to Petitioner's sentencing.
25 Allen told Davis about his mother's alcohol abuse, methods of discipline, husbands, and
26 problems the children encountered with their stepfathers. (Doc. 39-8 at 55-56.) Likewise,
27 Susan told Davis everything she believed was important about their upbringing, including
28 Petitioner's drug use and their mother's neglect and beatings. (Doc. 39-9 at 1-3.)

1 In addition to investigating Petitioner's social history, trial counsel consulted three
2 mental health experts. Dr. Sara Hill, a clinical psychologist, was asked to determine
3 Petitioner's competency to stand trial or plead guilty. In her report, Dr. Hill noted that
4 Petitioner said he had a long history of using marijuana, was on probation for a drug charge
5 prior to the murder, and went from smoking marijuana to smoking crack cocaine, which he
6 was doing "all day long at the time of his arrest." (Doc. 41-8 at 12.) She found Petitioner
7 to be "quite conversant in discussing legal matters" and "unequivocally competent to stand
8 trial." (*Id.* at 13.) She further found that Petitioner had a history of antisocial behaviors, but
9 required more background information to make a diagnosis of antisocial personality disorder.
10 (*Id.*)

11 Dr. Katherine Menendez, a psychologist, evaluated Petitioner "for the purpose of
12 establishing learning capacity and the presence of a learning disorder." (Doc. 41-8 at 15.)
13 In the background section of her report, Dr. Menendez described Petitioner as saying that his
14 mother had "treated him well," that he recalled only one incident of harsh physical discipline
15 from his first stepfather, that he had a "normal" early family life, and that he had been an
16 "average" student. (*Id.* at 15-16.) Petitioner reported that he began smoking crack cocaine
17 at age 28 and became "very paranoid, violent and hypersexual." (*Id.* at 17.) Dr. Menendez
18 determined that Petitioner had a full scale IQ of 80, which is below average, but that he did
19 not appear to have a "pronounced, significant learning disorder." (*Id.* at 20.) She also
20 diagnosed Petitioner with cocaine abuse in remission and an antisocial personality disorder.

21 Lastly, defense counsel enlisted the assistance of Dr. Susan Parrish, a psychologist
22 specializing in neuropsychological testing and post-traumatic stress disorder. (Doc. 40-7 at
23 30.) Dr. Parrish retained notes from her presentence interview with Petitioner, but could not
24 recall whether she performed any tests, made a diagnosis, or prepared a report. (*Id.* at 8.)
25 However, she believed she was asked to meet with Petitioner to determine whether he
26 displayed any obvious psychological difficulties and that "nothing jumped out at me that he
27 had any difficulties" such as an "obvious neuropsychological symptom" that would have
28 justified more testing or that needed to be pursued. (*Id.* at 17-18, 26-27.)

1 Trial counsel Ronan had few specific recollections of his conversations with the
2 experts and did not know whether he had provided Petitioner's social history to Dr. Hill or
3 school records to Dr. Menendez. (Doc. 40-5 at 63, 68, 71.) He testified that it was his usual
4 custom and practice to provide background information to consulting experts, but
5 acknowledged statements in Dr. Menendez's report about Petitioner's upbringing, such as
6 being an average student and getting along well with his mother, that contradicted
7 information compiled by Davis. (Doc. 40-6 at 7, 17-18.) Although he had no recall of
8 speaking with Dr. Menendez, Ronan testified that he did not consider a diagnosis of
9 antisocial personality disorder to be mitigating and "[b]ased on the report as I have now seen
10 it, I would not see any reason to call her." (*Id.* at 8.) He also acknowledged that evidence
11 concerning an antisocial personality disorder generally opens the door for prosecutors to
12 proffer evidence of bad acts consistent with that diagnosis. (*Id.* at 30.) Regarding Dr.
13 Parrish, Ronan believed it likely she found nothing helpful after meeting with Petitioner
14 because otherwise he would have had her prepare a report and testify at the sentencing
15 hearing. (*Id.* at 9.) He also would have consulted with others types of experts if Dr. Parrish
16 had made such a recommendation. (*Id.* at 9-10.)

17 Regarding Petitioner's drug use, Ronan believed the information that Petitioner had
18 purchased \$750 of crack cocaine in the four days prior to the offense was presented to the
19 sentencing judge in Davis's mitigation report. (Doc. 40-5 at 82-83.) Ronan did not know
20 whether Dr. Parrish had relayed to counsel that Petitioner told her he had spent \$2,000 during
21 the same time period, as reflected in her interview notes. (*Id.* at 73-74.) In response to a
22 question as to why he did not enlist and present testimony from experts in child development
23 and pharmacology, Ronan said he had no recollection of why those types of experts were not
24 utilized:

25 [M]y best guess is that I felt that Judge Reinstein, with his background and
26 experience would understand the information that was going to be presented
27 in Pam Davis's letter, that with his background and experience he understood
28 the nexus between substance abuse and the commission of crimes, substance
abuse and dysfunctional childhood, and those types of things, and that it was
simply going to be a question of whether he found that significant enough as
a mitigating factor to outweigh the aggravate [sic] factors.

1 (*Id.* at 84; Doc. 40-6 at 1.) In hindsight, he would not have made the same decisions on how
2 mitigation evidence was presented to the sentencing judge. (Doc. 40-6 at 5.)

3 In her deposition, co-counsel Cotto said that her representation was limited to drafting
4 the aggravation section of the presentencing memorandum and that Ronan was teaching her
5 how to handle a capital case. (Doc. 40-6 at 46.) She recalled that Ronan was “very clear”
6 that the mitigation investigation “needed to begin from the very onset.” (*Id.*) Cotto had no
7 recollection of meeting with experts but, after reviewing Dr. Menendez’s report, did not
8 believe her diagnosis of antisocial personality disorder was mitigating. (*Id.* at 50.) She
9 recalled meeting with Ronan to “discuss things as they developed and trying to figure out
10 what could be useful or not” and also recalled discussing Dr. Parrish, but had no specific
11 recollection of what was said. (*Id.* at 50-51.)

12 Petitioner’s *Strickland* expert, Vicki Liles, testified that counsel’s failure to provide
13 experts with background information, retain a substance abuse expert, and engage a
14 psychologist to “pull all [the background information] together” fell below the standard of
15 care for a capital defense attorney at the time of Petitioner’s sentencing. (Doc. 40-4 at 3-8.)
16 She further opined that antisocial personality disorder is mitigating and that counsel was
17 ineffective for failing to present that diagnosis at sentencing. (*Id.* at 15.) In addition, Liles
18 suggested that counsel was ineffective for failing, in light of Petitioner’s substance abuse, to
19 obtain a neuropsychological examination at the start of the case because a brain can “heal and
20 can repair itself.” (*Id.* at 21.)

21 At the time of Petitioner’s offense, Liles was employed by the Maricopa County
22 Public Defender but had no involvement in Petitioner’s case because she had a “more
23 generalized caseload at that time.” (Doc. 40-3 at 53.) She recalled that sometime in 1998
24 or 1999, her office formed a major felony unit comprised of three attorneys, including Ronan.
25 When Petitioner was sentenced in 1999, Liles had tried only one capital case through
26 sentencing and that was as second chair in an effort to become qualified to serve as lead
27 counsel in a capital case. (Doc. 40-4 at 88-89.) In a declaration proffered to the PCR court,
28 Liles opined that “it was standard practice to use the services of a mitigation specialist in

1 capital representation in 1998 and 1999” and that the “specialist would then locate and
2 suggest the participation of necessary experts.” (Doc. 43-4 at 4.) However, at the PCR
3 hearing, she acknowledged that under the 1989 ABA Guidelines in effect at the time a
4 “mitigation specialist wasn’t really required as part of the defense team.” (Doc. 40-3 at 71-
5 72.)

6 *Mitigation Evidence*

7 Petitioner’s brother Allen and sister Susan testified at the PCR hearing. Each
8 described their mother as a self-centered woman, who showed no love or affection, who on
9 occasion abandoned and regularly neglected their basic needs, and who routinely hit them
10 with belts and sticks for perceived infractions. (Doc. 39-8 at 14-86.) They also reported that
11 their mother drank heavily, had numerous failed marriages, and frequently fought with her
12 husbands. One of their stepfathers liked to pick fights and beat up on Allen and Petitioner.
13 Each saw Petitioner begin to use marijuana and inhalants when he was around 10 or 11 years
14 of age. Allen left home at age 17, when Petitioner was about 11, and Susan left home and
15 moved in with Allen when she was 14 and Petitioner was 13.

16 Petitioner also presented testimony from three new experts. Dr. Paul Miller, a
17 developmental psychologist, interviewed Petitioner, Allen, and Petitioner’s sister Patsy.
18 Based on these interviews as well as Davis’s mitigation report, Davis’s notes, and
19 Petitioner’s school records, Miller prepared a 60-page developmental assessment report that
20 examined the nature of the risk factors to which Petitioner was exposed as a child and the
21 relationship of those factors to later negative outcomes, such as conduct disorders and drug
22 abuse. (Doc. 39-9 at 63-64.) In summary, Dr. Miller opined that various life stressors,
23 including parental neglect, harsh discipline, exposure to domestic violence, maternal alcohol
24 abuse, frequent changes in residences and maternal marital relationships, and extreme
25 poverty led Petitioner to use drugs as a coping mechanism. (Doc. 39-6 at 17-20.) Because
26 he focused only on Petitioner’s adolescent development, Dr. Miller had no opinion on the
27 role Petitioner’s risk factors played in the offense. (Doc. 40-1 at 11.)

28 Dr. Edward French, a pharmacologist, testified regarding the physiological effects of

1 cocaine. Although Petitioner did not tell him the amount of crack cocaine he consumed prior
2 to the offense, Dr. French opined that Petitioner was in a cocaine-induced psychosis when
3 he attacked and killed the victim. (Doc. 40-3 at 26-27.) As support for this conclusion, Dr.
4 French cited statements made by Petitioner that (1) his heart was racing so fast during the
5 offense that he thought he would die (classic physiological effect of cocaine); (2) he believed
6 the victim knew his intentions based on an innocuous gesture to his wife (evidence of
7 paranoia); and (3) he had “no conscious there” during the attack (indicating a break in
8 reality). (*Id.* at 30-33.) In conclusion, Dr. French stated that drugs “hijack the brain,” cause
9 “pronounced behavioral and cognitive changes,” take over the behavior of an individual, and
10 diminish the ability “to process information correctly.” (*Id.* at 33-34.) On cross-
11 examination, Dr. French acknowledged that he was not qualified to diagnose mental disease
12 or defects and that the information about the effects of cocaine included in the mitigation
13 specialist’s report to the sentencing judge was accurate. (*Id.* at 35, 39.)

14 Dr. Richard Lanyon, a forensic and clinical psychologist, also testified. (Doc. 40-4
15 at 36-84; Doc. 40-5 at 1-43.) On the basis of record review, interviews, and psychological
16 testing, Dr. Lanyon prepared a lengthy report in which he concluded that Petitioner’s profile
17 “suggests the likelihood of a significant anxiety disorder, depression, and thought disorder”
18 but “does not indicate antisocial characteristics or the likelihood of impulsive acting-out.”
19 (Doc. 39-6 at 43.) He determined that Petitioner has a full scale IQ of 87, placing him in the
20 low-average range of intelligence. (*Id.* at 43-44.) He also found no suggestion of impaired
21 functioning due to brain damage. (*Id.* at 44.)

22 With regard to the offense, Dr. Lanyon opined it was highly probable that, as a result
23 of a cocaine-induced delusional psychotic state as well as a paranoid personality disorder,
24 Petitioner’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct
25 to the requirements of the law was significantly diminished. (*Id.* at 45.) Similar to Dr.
26 French, Dr. Lanyon based this opinion on the “serious and pivotal cognitive distortion” that
27 the victim knew he was going to do something to her. (*Id.*) According to Petitioner’s
28 account to Dr. Lanyon, he made a hand gesture to his wife signifying that the victim’s purse

1 was not in her truck, that there was “no way anyone could read that to mean anything,” but
2 nonetheless he “became convinced that the [victim] somehow knew what it was and was
3 going to, therefore, turn him in.” (Doc. 40-4 at 56-57.)

4 He has a delusion she knows exactly what he intends to do, and, in fact, these
5 thoughts are in his mind and it suggests that he feels very guilty about them,
6 then he becomes delusional that she knows exactly what’s going on, it’s in her
7 mind, too, and he then finds himself in these unusual physiological reactions
8 which signal, to me, are a likelihood of a cocaine induced psychosis, which a
9 major aspect of that is delusions.

10 (*Id.* at 74-75.)

11 Dr. Lanyon opined that this paranoid delusion caused Petitioner to enter into a
12 severely abnormal mental state, as evidenced by Petitioner’s statements that “[i]t was not me”
13 and that he had no thoughts or feelings when he attacked her. Rather, there was “[c]omplete
14 blackness. I stepped into a hole . . . everything’s dark.” (Doc. 39-6 at 41.) Petitioner told
15 Dr. Lanyon that he had no control over the initial attack and that his subsequent actions were
16 done out of panic. (*Id.* at 42.) In Dr. Lanyon’s opinion, Petitioner remained in a psychotic
17 state while taking deliberate actions not to get caught. (Doc. 40-5 at 8-10.) Regarding
18 antisocial personality disorder, Dr. Lanyon declined to make such a diagnosis, but
19 acknowledged there were “enough symptoms or characteristics” to put him into that
20 category. (*Id.* at 19-20.) Finally, Dr. Lanyon concluded that Petitioner’s cocaine use was a
21 product of the extreme dysfunction in his childhood environment and thus “the effects of his
22 childhood environment can also be considered to be a causal factor in significantly
23 diminishing his capacity to appreciate the wrongfulness of his conduct or to conform his
24 conduct to the requirements of law.” (Doc. 39-6 at 46.)

25 The State presented Dr. Michael Bayless in rebuttal. Dr. Bayless determined that
26 Petitioner has a full scale IQ of 88 and found no indication of neurological impairment.
27 (Doc. 43-9 at 11.) In his report, Dr. Bayless concluded that Petitioner has a personality
28 disorder not otherwise specified, with antisocial and obsessive compulsive traits. He
changed his diagnosis to an antisocial personality disorder after reviewing a 1986
psychological evaluation conducted as part of a diagnostic evaluation for the Utah

1 Department of Corrections. (Doc. 40-1 at 29.) In that report, clinical psychologist Dr.
2 Donald Long diagnosed Petitioner, then 18 years old, with a conduct disorder and extreme
3 emotional immaturity. (Doc. 44-2 at 20.) He also derived an abstract IQ of 89. (*Id.* at 19.)

4 Dr. Bayless's interview notes reveal that Petitioner relayed essentially the same story
5 regarding the offense as he told to Drs. French and Lanyon, namely that he made a motion
6 to his wife to indicate "there's nothing [in the victim's truck]," that the victim "saw and got
7 spooked and said I've got to go," and that when she turned toward the door, "the darkness
8 came over me, heart racing, and I grabbed her in bear hug." (Doc. 44-2 at 9; Doc. 40-2 at
9 10.) The notes also reported Petitioner as saying that he "crossed line—blackness
10 clearing—on probation, hit her with wooden pole." (Doc. 44-2 at 9; Doc. 40-2 at 13.) Dr.
11 Bayless testified that when he asked Petitioner why he raped her, Petitioner smiled and
12 gestured in a way that angered Dr. Bayless, who interpreted the gesture to mean "seeing a
13 vaginal area would make me do such a thing." (Doc. 40-1 at 45.) In relaying this
14 impression, Dr. Bayless stated that the victim's dress had flown up. (*Id.*) On cross-
15 examination, Dr. Bayless acknowledged that the victim had not been wearing a dress and that
16 his notes did not include this aspect of Petitioner's statement, but that he remembered it
17 "precisely" and despite the inaccuracy concerning her clothing was "what [Petitioner] said
18 to me." (Doc. 40-2 at 15-16.)

19 Addressing antisocial personality disorders, Dr. Bayless testified that such a disorder
20 would not render a person incapable of knowing right from wrong or from having the ability
21 to control his or her conduct. (Doc. 40-1 at 53.) Rather, "it's choice issues"—such
22 individuals know what's right, know what is acceptable, but choose not to act appropriately.
23 (*Id.*) He further testified that the "central feature of a substance induced psychotic disorder
24 are hallucinations and delusions that are due to the direct physiologic effects of [the]
25 substance" and that in this case Petitioner "knew exactly what was going on. He was not
26 seeing things. He was not hearing voices. He was not delusional." (*Id.* at 48.) Dr. Bayless
27 concluded that Petitioner was "fully aware of what he was doing" when he committed the
28 offense and "knew it was wrong." (*Id.* at 46.)

1 He explained to me, he talked about it very clearly. He remembered the
 2 essence of what had taken place. He was very much focused. He was very
 much in reality when we talked about what happened on the day of the offense.

3 Look, there is no indication that he was suffering from any psychosis.
 4 There is no indication that he did not know what he was doing. There is no
 indication that cocaine played a role in his behavior, his choices at the time.
 5 Was he high on cocaine? He had done some cocaine. But was he at a point
 where now he did not know what he was doing? No.

6 His voluntary intoxication at that time was voluntary intoxication, but
 7 he was not at a level that he did not know what he was doing. Pure and
 simple. He knew why he moved the car. He knew why he put a blanket over
 8 her stomach when he stabbed her. He knew what he was doing when he raped
 her. He said to me specifically: I'm going to make this look—I wanted to
 9 make this look like she was raped in a robbery. He said that to us specifically,
 that he thought that before he did it. I don't know what all the fight is about.

10 (Doc. 40-2 at 29.)

11 *State Court Ruling*

12 Following the hearing and submission of post-hearing memoranda, the state PCR
 13 court denied relief in a 15-page ruling. (Doc. 38-9.) After setting forth in detail the standard
 14 for relief under *Strickland v. Washington*, 466 U.S. 668 (1984), the court addressed the
 15 credibility of the expert opinions. It found that much of “Dr. French’s opinions were based
 16 on speculation about the quantity of cocaine that was used by the Defendant.” (Doc. 38-9
 17 at 35-36.) It further found that Dr. Lanyon’s opinions “were less than persuasive.” (*Id.* at
 18 36.) Specifically the court wrote:

19 Dr. Lanyon believed that Sansing’s statement to him that everything went
 20 black and blank was a strong indication of psychosis. [Footnote 20: Sansing’s
 trial attorney testified at the evidentiary hearing that he does not ever recall
 21 Sansing saying this to him. If Sansing had said this to him, he would have
 followed up on these statements.] However, Dr. Lanyon’s opinions were
 22 contradicted by Dr. Michael Bayless (a psychologist called by the state) and
 several versions of the facts of the crime provided by Sansing in which he
 23 remembers many details after the alleged “going black” episode. Dr. Bayless
 opined that the Defendant suffered from a classic anti-social personality
 24 disorder, that Sansing was high on cocaine at the time of the crime, but that he
 knew what he was doing was wrong. Significantly, Sansing smiled as he
 25 described to Dr. Bayless the reason why he committed the rape: he saw Trudy
 Calabrese’s vaginal area. Sansing also described that he placed a blanket over
 26 Trudy to stab her so as to avoid blood splatter. This court finds the testimony
 of Dr. Bayless to be the more credible and more persuasive.

27 (*Id.* at 36-37.)

28 Addressing *Strickland*’s performance prong, the PCR court noted that trial counsel

1 had consulted with three different mental health experts, one of whom diagnosed Petitioner
2 with an antisocial personality disorder and another who recalled no issues that required
3 further testing. The court noted that although Ronan could not recall what information he
4 supplied to Dr. Menendez, he did not doubt supplying her with any available records, as was
5 his standard practice. The court further noted Ronan's belief that proffering evidence of an
6 antisocial personality disorder as mitigation would have opened the door to the prosecution
7 submitting evidence of Petitioner's other violent, antisocial acts. "This type of 'double-
8 edged' mitigation evidence would be more detrimental than helpful, and making a strategic
9 decision to avoid damaging a case for mitigation despite losing a slim advantage cannot be
10 unreasonable." (*Id.* at 38-39.) Regarding counsel's failure to utilize expert witnesses, the
11 court credited Ronan's belief that the trial judge's background and experience would allow
12 him to understand the nexus between Petitioner's difficult childhood, his drug use, and the
13 murder.

14 In conclusion, the court stated:

15 [T]he issue presented is whether Sansing's counsel performed deficiently, or
16 rather, unreasonably based on the information he knew at the time, and based
17 on the extent of his investigations and reliance on medical and mental health
18 experts. Based on the factual accounts from the evidentiary hearing, counsel
19 appears to have acted reasonably, even though no expert witnesses were called
20 during the mitigation phase to attempt to create a causal nexus between
21 Sansing's drug usage, tough childhood and antisocial personality disorder and
22 the crime. This court finds that the testimony of Dr. Paul Miller regarding the
23 Defendant's abusive childhood was duplicative of the investigation of Pamela
24 Davis. The court further finds that the proposed expert testimony such as that
25 offered by Drs. French and Lanyon regarding the effects and nexus between
26 Defendant's cocaine use and the commission of the crime to be speculative
27 and unpersuasive. The evidence of a "cocaine-induced psychosis" is
28 speculative at best. Many of the facts upon which Dr. Lanyon based his
testimony were quite effectively disputed by Dr. Michael Bayless. Dr.
Bayless' opinions (including those disputing that any psychosis existed at the
time of the crime given Sansing's detailed memory of what had occurred) were
far more credible and reasonable. More importantly, [trial counsel] did not call
expert witnesses for strategic or tactical reasons. I find no deficient
performance by trial counsel.

(*Id.* at 39-40.)

Turning to *Strickland*'s prejudice prong, the court found that, even assuming counsel
performed deficiently in failing to investigate and call experts, Petitioner had failed to

1 demonstrate a reasonable probability of a different outcome. First, it concluded that, in light
2 of his attempts to avoid prosecution, expert testimony connecting his dysfunctional
3 upbringing to the offense would not have established that he was unable to appreciate the
4 wrongfulness of his actions or to conform his conduct to the requirements of the law.
5 Specifically, the court noted that Petitioner moved the victim's truck, lied and gave false
6 information when asked about the victim's whereabouts, and hid the body. Analogizing to
7 decisions by the Arizona Supreme Court in other capital cases, the PCR court concluded that
8 each of these actions "was performed in order to elude suspicion and avoid prosecution" and
9 "clearly demonstrated that he fully appreciated the wrongfulness of his conduct." (*Id.* at 41-
10 42.)

11 Similarly, the court found that expert testimony concerning cocaine intoxication
12 would not have established that he was unable to conform his conduct to the requirements
13 of the law due to drug impairment at the time of the offense. Again referencing a state
14 supreme court case, the court noted that most of the testimony about Petitioner's drug use
15 was derived from Petitioner himself. Because of Petitioner's "motive to fabricate self-
16 serving testimony," this evidence would have been met with skepticism. (*Id.* at 42-43.) The
17 court also observed that although "no expert testified about Sansing's tough childhood, drug
18 use, anti-social personality disorders or a causal nexus between his personality disorder and
19 the crime, the *factual information* regarding Sansing's difficult childhood, his drug use, and
20 the crime was presented to the sentencing judge." (*Id.* at 43.) Finally, the court found that
21 the murder was "horribly cruel" and that even if all of the proffered mitigating circumstances
22 were proven, no reasonable jury would find the mitigation sufficiently substantial to
23 outweigh the aggravation. (*Id.* at 43-44.)

24 Controlling Law

25 As recognized by the state court, claims of ineffective assistance of counsel are
26 governed by the principles set forth in *Strickland*. To prevail, a petitioner must show that
27 counsel's representation fell below an objective standard of reasonableness and that the
28 deficiency prejudiced the defense. 466 U.S. at 687-88.

1 The inquiry under *Strickland* is highly deferential and “every effort [must] be made
2 to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s
3 challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.*
4 at 689; see *Wong v. Belmontes*, 130 S. Ct. 383, 384 (2009) (per curiam); *Bobby v. Van Hook*,
5 130 S. Ct. 13, 16 (2009) (per curiam). Thus, to satisfy *Strickland*’s first prong, a defendant
6 must overcome “the presumption that, under the circumstances, the challenged action might
7 be considered sound trial strategy.” *Id.* “The test has nothing to do with what the best
8 lawyers would have done. Nor is the test even what most good lawyers would have done.
9 We ask only whether some reasonable lawyer at the trial could have acted, in the
10 circumstances, as defense counsel acted at trial.” *Id.* at 687-88.

11 With respect to *Strickland*’s second prong, a petitioner must affirmatively prove
12 prejudice by “show[ing] that there is a reasonable probability that, but for counsel’s
13 unprofessional errors, the result of the proceeding would have been different. A reasonable
14 probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*,
15 466 U.S. at 694. “When a defendant challenges a death sentence . . . the question is whether
16 there is a reasonable probability that, absent the errors, the sentencer . . . would have
17 concluded that the balance of aggravating and mitigating circumstances did not warrant
18 death.” 466 U.S. at 695. In *Wiggins v. Smith*, the Court further noted that “[i]n assessing
19 prejudice, we reweigh the evidence in aggravation against the totality of available mitigating
20 evidence.” 539 U.S. 510, 534 (2003); see also *Mayfield v. Woodford*, 270 F.3d at 928. The
21 “totality of the available evidence” includes “both that adduced at trial, and the evidence
22 adduced” in subsequent proceedings. *Wiggins*, 539 U.S. at 536 (quoting *Williams v. Taylor*,
23 529 U.S. 362, 397-98 (2000)).

24 Under the AEDPA, this Court’s already-deferential review of trial counsel’s
25 performance is subject to another level of deference under § 2244(d) and is thus “doubly”
26 deferential. *Richter*, 131 S. Ct. at 788 (quoting *Knowles v. Mirzayance*, 129 S. Ct. 1411,
27 1420 (2009)). Therefore, to establish entitlement to relief, Petitioner must make the
28 additional showing that the PCR court, in ruling that trial counsel was not ineffective, applied

1 *Strickland* in an objectively unreasonable manner. In making this determination, “the
2 question is not whether counsel’s actions were reasonable,” but “whether there is any
3 reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.* Because
4 the *Strickland* standard is a general one, “the range of reasonable applications is substantial.”
5 *Id.*

6 Analysis

7 Petitioner first asserts that the PCR court made no findings of fact nor reached any
8 conclusions of law on his allegations concerning counsel’s failure to investigate and to
9 present Petitioner’s social history to the experts, and that he is thus entitled to *de novo* review
10 on these claims. However, it is apparent from the record that the court at least implicitly
11 ruled on these allegations when it stated that “the issue presented is whether Sansing’s
12 counsel performed deficiently, or rather, unreasonably based on the information he knew at
13 the time, and based on the extent of his investigations and reliance on medical and mental
14 health experts.”⁵ (Doc. 38-9 at 39.) In addition, the court described the extent of counsel’s
15 investigation and noted counsel’s testimony regarding his standard practice with respect to
16 providing background information to experts. In the absence of a clear indication that the
17 state court declined to reach the merits of Petitioner’s claim, this court “must assume that the
18 state court has decided all the issues.” *Murdoch v. Castro*, 609 F.3d 983, 990 n.6 (9th Cir.
19 2010) (en banc) (plurality opinion); see *Muth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005)
20 (“An adjudication on the merits is perhaps best understood by stating what it is not: it is not
21 the resolution of a claim on procedural grounds.”); see also *Miller-El v. Cockrell*, 537 U.S.
22 322, 347 (2003) (noting that “a state court need not make detailed findings addressing all the
23

24 ⁵ The court also described Petitioner’s claim as failing “to fully investigate and
25 develop possible mitigating factors, because expert witnesses were not presented,” failing
26 “to utilize an expert to explain his difficult childhood and polysubstance abuse,” failing “to
27 establish a causal nexus between Sansing’s upbringing, antisocial personality disorder and
28 the crime,” failing to consult “with an expert in cocaine addiction,” and failing “to produce
an expert to develop the causal nexus between his substance abuse and the crime.” (Doc. 38-
9 at 35.)

evidence before it”); *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) (holding that “Federal habeas review is not *de novo* when the state court does not supply reasoning for its decision”).

Addressing review under § 2254(d), Petitioner argues that the PCR court unreasonably applied *Strickland* in finding neither deficient performance nor prejudice. He further asserts that the state court’s decision was based on the following seven instances of “unreasonable” factual determinations:

(1) The court’s implicit determination that Ronan provided background information to Dr. Menendez, despite the discrepancies between her report and the available information concerning Petitioner’s academic performance and relationship with his mother;

(2) The court’s adoption of Dr. Bayless’s account that Petitioner raped the victim because he saw her vaginal area when her dress flew up, despite the fact the victim had not been wearing a dress, Petitioner had not relayed seeing her vaginal area in any of his previous statements about the offense, and the absence of this alleged statement in Dr. Bayless’s report and interview notes.

(3) The court’s determination that Dr. Bayless was more credible than Petitioner’s experts, in light of Dr. Bayless’s testimony the victim was wearing a dress, his assertion that Petitioner suffered from no mental illness despite antisocial personality disorder being identified in the DSM as a mental illness, his unfounded assertions concerning the cost and amount of cocaine used by Petitioner, and his unprofessional personal feelings against Petitioner;

(4) The court’s determination that Dr. French’s opinion was based upon speculation about the quantity of cocaine used by Petitioner, despite Dr. French testifying that his opinion was not based on the amount of drugs Petitioner consumed;

(5) The court’s finding that trial counsel chose to not offer the diagnosis of antisocial personality disorder as a mitigating factor because it could have opened the door to damaging rebuttal evidence, given that Ronan did not expressly testify he made such a decision in Petitioner’s case, only that he agreed generally that prior bad acts would be part of the calculus an attorney would consider in deciding whether to present evidence of an antisocial personality disorder;

(6) The court’s finding that Dr. Miller’s report was duplicative of that prepared by the mitigation specialist, given that as a developmental psychologist Dr. Miller’s report “goes much further” than Davis’s investigation and had a different purpose; and

(7) The court’s finding that trial counsel made a tactical decision not to present expert witnesses, given that Ronan had no recollection of why he did not do so.

(Doc. 35 at 58-67.)

1 Under the standard set forth in § 2254(d)(2), a state court decision “based on a factual
2 determination will not be overturned on factual grounds unless objectively unreasonable in
3 light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. at 340
4 (2003); *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (“[A] federal court may not
5 second-guess a state court’s fact-finding process unless, after review of the state-court record,
6 it determines that the state court was not merely wrong, but actually unreasonable.”). A state
7 court’s factual determination “is not unreasonable merely because the federal habeas court
8 would have reached a different conclusion in the first instance.” *Wood v. Allen*, 130 S. Ct.
9 841, 849 (2010). “This is a daunting standard—one that will be satisfied in relatively few
10 cases.” *Taylor*, 366 F.3d at 1000.

11 *Counsel’s Performance*

12 After reviewing the entirety of the record, this Court concludes that the state court
13 reasonably determined that Ronan made a tactical decision, after conducting a reasonable
14 investigation, not to present evidence of an antisocial personality disorder or to utilize expert
15 witnesses to testify concerning Petitioner’s difficult childhood, drug addiction, and cocaine
16 intoxication at the time of the offense.

17 The evidence at the PCR hearing established that counsel consulted three different
18 experts. Dr. Hill’s report indicated that she was retained to determine Petitioner’s
19 competency to stand trial or plead guilty. Dr. Menendez’s report stated that she was asked
20 to determine whether Petitioner suffered from a learning disability. Neither counsel nor Dr.
21 Parrish could recall her role in the case, but given her specialization in neuropsychology and
22 post-traumatic stress disorder, it is not unreasonable to conclude that she was on the lookout
23 for problems in these areas.

24 In addition, counsel enlisted a mitigation specialist to investigate and prepare a
25 detailed social history report. According to Davis’s report, she had extensive personal
26 interviews with Petitioner and his wife, mother, father, stepmother, brother, three sisters, and
27 several aunts and uncles. She described Petitioner’s positive relationship with the only
28 significant male figure in his life—a maternal grandfather who died unexpectedly when

1 Petitioner was seven years old. She relayed that between the ages of six and 14, Petitioner
2 lived in a very unstable home, that his mother went through a succession of relationships
3 with men, none of which were positive or supportive, that they lived in poverty, and that
4 Petitioner's mother did not permit his father to have contact with Petitioner and his siblings.
5 Davis recounted that Petitioner's mother "forbid her children to play outside or have friends
6 in their home" and that there was one instance when a welfare worker arrived unannounced
7 and found their living conditions to be "unacceptable." Describing Petitioner's mother's
8 marriage to her second husband, when Petitioner was between the ages of six and ten, Davis
9 reported that Petitioner's stepfather was an extremely abusive alcoholic, who would spend
10 the weekends drinking and fighting with his wife. During these times, Petitioner and his
11 siblings would be denied food and sleep until the fighting ended for the night, and
12 Petitioner's mother would forbid her children from eating or going to bed until a fight was
13 resolved. The mitigation report also detailed Petitioner's juvenile criminal history, poor
14 academic record, drug use beginning in the fifth grade, relationship with Kara Sansing, adult
15 criminal history, and crack cocaine addiction.

16 Petitioner argues it was unreasonable for the court to implicitly find that Ronan
17 provided this background information to Dr. Menendez. However, while Dr. Menendez's
18 report contains some factual discrepancies compared to the information gathered by
19 mitigation specialist Davis, this Court cannot say that the state court's finding was
20 objectively unreasonable in light of Ronan's testimony concerning his standard practice of
21 providing available background materials to experts and his having no reason to believe he
22 did not follow this practice in this case. Because Dr. Menendez did not testify at the PCR
23 hearing, there is no way to know whether she was given background materials but for
24 whatever reason neglected to review them. Nor is there anything in the record to suggest that
25 counsel failed to provide Petitioner's social history to Drs. Hill and Parrish; Dr. Hill did not
26 testify and Dr. Parrish had no specific recollection.

27 In addition, Petitioner does not allege that any of the experts requested additional
28 information, *see Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) (holding that

1 counsel does not have a duty to provide an expert with information necessary to reach a
2 mental health diagnosis in the absence of a specific request to do so), or that the absence of
3 any particular information precluded an accurate evaluation of Petitioner's mental state, *see*
4 *Crittenden v. Ayers*, 624 F.3d 943, 965 (9th Cir. 2010) (noting that none of the experts
5 suggested that additional background information or testing was necessary to accurately
6 evaluate the defendant's mental health). Nor does Petitioner assert how additional
7 background information would have affected any of the expert's conclusions.

8 Petitioner argues that it was unreasonable for the court to find that Ronan made a
9 strategic decision not to offer the diagnosis of antisocial personality disorder as a mitigating
10 factor. However, the record supports the state court's finding that Ronan likely concluded
11 that the antisocial personality disorder diagnosed by Dr. Menendez would have harmed more
12 than helped the mitigation case. Although Ronan could not recall whether he considered
13 presenting evidence of Petitioner's antisocial personality disorder, he testified that in his
14 opinion such a diagnosis is not mitigating. He also testified that evidence of an antisocial
15 personality disorder generally opens the door for prosecutors to present evidence of prior bad
16 acts consistent with that diagnosis. Based on this testimony, it was not unreasonable for the
17 state court to conclude that Ronan made a strategic decision in Petitioner's case not to call
18 Dr. Menendez as a witness at sentencing.

19 Nor was it unreasonable for the state court to determine that the strategy itself was
20 reasonable. *Cf. Crittenden*, 624 F.3d at 968 n.15 (finding that counsel made tactical decision
21 supported by adequate investigation to keep evidence of antisocial personality disorder away
22 from sentencing jury). The Ninth Circuit has repeatedly observed that evidence of an
23 antisocial personality disorder may be potentially more harmful than helpful. *See, e.g.,*
24 *Daniels v. Woodford*, 428 F.3d 1181, 1204, 1210 (9th Cir. 2005) (suggesting that evidence
25 the defendant may have been a sociopath was aggravating); *Beardslee v. Woodford*, 358 F.3d
26 560, 583 (9th Cir. 2004) (acknowledging that an antisocial personality diagnosis can be
27 damaging); *Clabourne v. Lewis*, 64 F.3d 1373, 1384 (9th Cir. 1995) (noting that mental
28 health records omitted from the sentencing hearing "hardly turned out to be helpful" because

1 they indicated that the defendant had an antisocial personality, not a thought disorder). Here,
2 evidence of Petitioner's antisocial personality disorder would have opened the door to
3 Petitioner's history of antisocial behavior, including violence against his wife, involvement
4 of his children in other illegal activities, and other past crimes. Thus, this case differs from
5 *Stankewitz v. Wong*, 698 F.3d 1163, 1174 (9th Cir. 2012), where the court found that
6 evidence of an antisocial personality would not have had a significant adverse impact
7 because the prosecution had "already painted a grim picture of Stankewitz's violent,
8 antisocial tendencies" and the jury had "heard next to nothing about Stankewitz's traumatic
9 childhood."

10 Petitioner also argues that the state court unreasonably determined that Ronan made
11 a strategic decision not to present expert witnesses to establish a nexus between Petitioner's
12 commission of the offense and his substance abuse and dysfunctional upbringing.
13 Information about Petitioner's dysfunctional upbringing, past substance abuse, and cocaine
14 use at the time of the crime were presented to the judge through the mitigation specialist's
15 report. Although Ronan had difficulty remembering his exact thought process, he speculated
16 that he presented the mitigation case without experts because he believed the sentencing
17 judge had the background and experience to understand the connection between Petitioner's
18 background, drug abuse, and the crime. This was sufficient evidence from which the state
19 court could reasonably conclude that counsel made a strategic decision.

20 Moreover, it was not objectively unreasonable for the state court to find that Ronan
21 acted reasonably in not utilizing expert witnesses to establish a nexus between Petitioner's
22 dysfunctional upbringing, drug abuse, and the crime. *See Hurles v. Ryan*, No. 08-99032,
23 2013 WL 219222 (9th Cir. Jan. 18, 2013) (finding that "counsel did not perform below the
24 objective standard of care when she did not establish a causal nexus between Hurles's mental
25 conditions and the crime" because Supreme Court precedent did not require such a showing).
26 The connection between Petitioner's difficult childhood and drug addiction "was neither
27 complex nor technical. It required only that the [judge] make logical connections of the kind
28 a layperson is well equipped to make." *Wong v. Belmontes*, 130 S. Ct. 383, 388 (2009); *see*

1 *Fairbank v. Ayers*, 650 F.3d 1243, 1253 (9th Cir. 2011) (finding no ineffectiveness from
2 counsel's failure to utilize an expert to link substance abuse and abusive childhood to the
3 defendant's behavior during the crime); *see also Raley v. Ylst*, 470 F.3d 792, 803 (9th Cir.
4 2006) (noting that "the link between suffering abuse as a child and later committing abusive
5 acts is not so esoteric as to be beyond the understanding of a lay jury"); *Nields v. Bradshaw*,
6 482 F.3d 442, 455-56 (6th Cir. 2007) (finding no ineffectiveness from counsel's failure to
7 have an expert testify about the causal relationship between the defendant's alcoholism and
8 his behavior on the night of the murder). In hindsight Ronan questioned whether he made
9 the right decision on how the mitigation evidence was presented. However, this is
10 insufficient to establish deficient performance under *Strickland*'s highly deferential standard.

11 In light of the record developed in state court, the Court concludes that the state
12 court's finding of no deficient performance was based on neither an unreasonable application
13 of *Strickland* nor an unreasonable determination of fact. Ronan could not recall many of the
14 specifics of his decision-making process; however, there was sufficient other evidence in the
15 record to support the state court's findings. *See Greiner v. Wells*, 417 F.3d 305, 326 (2nd
16 Cir. 2005) ("Time inevitably fogs the memory of busy attorneys. That inevitability does not
17 reverse the *Strickland* presumption of effective performance."); *see also Richter*, 131 S. Ct.
18 at 790 ("Although courts may not indulge *post hoc* rationalization for counsel's
19 decisionmaking that contradicts the available evidence of counsel's actions, neither may they
20 insist counsel confirm every aspect of the strategic basis for his or her actions.") (internal
21 quotation omitted). Counsel undertook a reasonable investigation and made strategic
22 decisions about the evidence to proffer in mitigation and how that evidence would be
23 presented. "A disagreement with counsel's tactical decisions does not prove that the
24 representation was constitutionally deficient." *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir.
25 2010).

26 *Prejudice*

27 In ultimately concluding that Petitioner was not prejudiced by any of counsel's alleged
28 deficiencies, the state court made numerous findings, including that Dr. Bayless was more

1 credible than Dr. Lanyon, that the opinions of Drs. French and Lanyon regarding a cocaine-
2 induced psychosis were speculative and unpersuasive, that the proposed expert testimony
3 would not have established that Petitioner's ability to appreciate the wrongfulness of his
4 actions or to conform his conduct to the law's requirements was substantially impaired, that
5 Dr. Miller's report was duplicative of that prepared by the mitigation specialist, and that the
6 factual information regarding Petitioner's difficult childhood and drug abuse was before the
7 sentencing judge.

8 Petitioner takes issue with the state court's credibility determinations concerning the
9 experts, but federal courts have "no license to redetermine credibility of witnesses whose
10 demeanor has been observed by the state trial court, but not by them." *Marshall v.*
11 *Lonberger*, 459 U.S. 422, 434 (1983). Even if reasonable minds reviewing a record might
12 disagree about a witness's credibility, "on habeas review that does not suffice to supersede
13 the trial court's credibility determination." *Rice v. Collins*, 546 U.S. 333, 341-42 (2006).
14 Rather, "so long as 'fairminded jurists could disagree' on the correctness" of the state court's
15 credibility findings, Petitioner cannot demonstrate that these findings were objectively
16 unreasonable. *Richter*, 131 S. Ct. at 786 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664
17 (2004)).

18 Petitioner argues that it was objectively unreasonable for the PCR court to find that
19 Petitioner committed the rape after seeing the victim's vaginal area because Dr. Bayless
20 failed to document this alleged statement in his report or notes, Petitioner never made such
21 an assertion in his other numerous statements about the offense, and the victim was not
22 wearing a dress. In making this finding, the state court concluded that Dr. Bayless was a
23 credible witness. Because as discussed next it was not objectively unreasonable for the state
24 court to credit Dr. Bayless's testimony, none of Petitioner's alleged grounds are sufficient
25 to overturn the state court's determination that Petitioner raped the victim after seeing her
26 vaginal area. Moreover, the state court's reference to Petitioner's alleged sexual arousal
27 played no significant role in its ultimate findings concerning counsel's representation.
28 Petitioner had also reported both to Dr. Bayless and other experts that he raped the victim in

1 order to make it look like she had been raped during a robbery. And it was this fact, separate
2 from Petitioner's alleged arousal, that formed the basis of Dr. Bayless's opinion that
3 Petitioner was fully aware of his actions when he committed the offense.

4 In a related argument, Petitioner asserts that it was objectively unreasonable for the
5 state court to find Dr. Bayless more credible than Drs. Lanyon and French. However, this
6 is a classic credibility determination to which this Court must defer so long as "fairminded
7 jurists could disagree." *Richter*, 131 S. Ct. at 786. The essence of Petitioner's experts'
8 testimony was that Petitioner entered a cocaine-induced psychotic state when Petitioner
9 irrationally concluded that the victim could read his mind and was going to report him to the
10 police. They based their conclusion on not only Petitioner having been on a crack binge for
11 days, but also on his describing having "no conscious there" and experiencing "blackness"
12 when he initiated the attack on Calabrese. However, as noted by the state court, trial counsel
13 did not recall Petitioner ever telling him that he had no control over his actions and that
14 counsel would have followed up on such a statement. (Doc. 38-9 at 36 n.20; Doc. 40-6 at
15 10.) It is also noteworthy that in interviews with the post-conviction experts Petitioner said
16 the victim never regained consciousness. This change in narrative, in the face of his
17 stipulated plea, his wife's testimony, and his statement to a reporter concerning the victim's
18 consciousness, casts some doubt on the veracity of his newly-claimed lack of control.
19 Regardless, Dr. Bayless testified that a cocaine-induced psychosis requires hallucinations and
20 delusions and that in this case Petitioner was not delusional but knew exactly what he was
21 doing as evidenced by Petitioner's logical and deliberate actions. In light of the competing
22 experts' opinions and the evidentiary record, it was not objectively unreasonable for the state
23 court to credit Dr. Bayless's testimony over that of Drs. Lanyon and French.

24 Petitioner also complains that the state court unreasonably determined that the
25 testimony of Dr. Miller regarding Petitioner's difficult childhood was duplicative of that
26 reported by mitigation specialist Davis because Dr. Miller's report examined the nature of
27 the risk factors that Petitioner was exposed to as a child, "such as abuse, neglect, parental
28 alcoholism, multiple marriages and divorces, and violent, aggressive behavior between adults

1 in the home.” (Doc. 35 at 58.) He further asserts that Davis was unqualified to opine
2 whether Petitioner’s “background contributed to psychological conditions or was a causal
3 factor in the commission of the offense.” (*Id.*) However, Dr. Miller rendered no such
4 opinion, testifying only that the identified risk factors increase the probability a child will
5 someday engage in criminal activity. He expressly declined to offer an opinion about what
6 role Petitioner’s risk factors may have played in the offense or to assess Petitioner’s
7 psychological condition. (Doc. 40-1 at 11.) In addition, Dr. Miller’s report is based in large
8 measure on Davis’s mitigation report and her interview notes. It was not objectively
9 unreasonable for the state court to find that Dr. Miller’s contributions were largely
10 duplicative of mitigation specialist Davis.

11 After careful review of the record, the Court concludes that it was not objectively
12 unreasonable for the PCR court to find no reasonable probability of a different outcome had
13 counsel presented expert testimony concerning cocaine intoxication and connecting
14 Petitioner’s dysfunctional upbringing to his drug addiction and to the offense. The testimony
15 at the PCR hearing of Petitioner’s siblings and Dr. Miller was largely duplicative and
16 cumulative of the information contained in the mitigation specialist’s report. The sentencing
17 judge found, based on Davis’s report, that Petitioner had established a difficult childhood as
18 a mitigating factor. Similarly, the sentencing judge found as a nonstatutory mitigating factor
19 that Petitioner was somewhat impaired by crack cocaine at the time of the offense. Petitioner
20 argues that expert testimony would have shown that he was in a cocaine-induced psychosis
21 and thus *substantially* impaired under A.R.S. § 13-703(G)(1), but the PCR court found
22 otherwise. This was not an unreasonable determination in light of the evidence of
23 Petitioner’s planning, deliberate actions to conceal the crime, and his detailed memory of
24 what occurred. Specifically, it was not unreasonable to find that Petitioner had the ability
25 to appreciate the wrongfulness of his actions based on his discussing a plan to rob the victim
26 before she arrived at the house, moving the victim’s truck, lying to her church about her
27 whereabouts and his home address, washing the stick used to bludgeon her head, and hiding
28 the body.

1 *Conclusion*

2 In determining that Petitioner's Sixth Amendment right to the effective assistance of
3 counsel was not violated by counsel's alleged deficiencies in investigating and presenting
4 mitigating evidence, the PCR court neither unreasonably applied *Strickland* nor unreasonably
5 determined the facts in light of the evidence developed in state court. Because Petitioner is
6 precluded from relief by § 2254(d), the Court declines to permit discovery, expansion of the
7 record, and an evidentiary hearing on Claim 2.

8 **B. Failure to Investigate and to Rebut Aggravation**

9 In Claim 3, Petitioner alleges that counsel was ineffective for failing to investigate
10 generally and failing to present evidence to rebut the cruelty prong of the (F)(6) aggravating
11 factor. Specifically, he asserts counsel should have interviewed Petitioner's wife and
12 children, and hired an independent forensic pathologist to offer an opinion on whether the
13 victim was conscious at the time of the sexual assault and stabbing.

14 Respondents contend that Claim 3 was never fairly presented in state court and is now
15 procedurally defaulted. Petitioner counters that the claim was raised in Claim Three of his
16 second amended PCR petition, which alleged that Petitioner's plea and sentencing were the
17 product of ineffective assistance of counsel because counsel failed to inform Petitioner of the
18 effects of his plea and sentencing stipulations. (Doc. 38-10 at 27-28.) Within the body of
19 this claim, counsel asserted that the defense had not interviewed Petitioner's children. In
20 support, he appended declarations from Petitioner, asserting that counsel did not interview
21 the children, and his *Strickland* expert, asserting that counsel should not have permitted the
22 sentencing stipulation "without first having interviewed the children and explaining the
23 severe consequences of the stipulation." (Doc. 43-10 at 13; Doc. 43-4 at 6.)

24 The Court finds that Claim 3 was not fairly presented in state court. While the PCR
25 petition mentions an alleged failure to interview Petitioner's children, it does so in the
26 context of arguing counsel's ineffectiveness for failing to properly advise Petitioner of the
27 consequences of signing a stipulation summarizing the children's statements to police and
28 a counselor (which forms the basis of Claim 4 below), not as part of a claim asserting

1 ineffectiveness for failing to investigate and uncover evidence necessary to rebut the (F)(6)
 2 aggravating factor. Petitioner's PCR petition did not alert the state court to either the legal
 3 theory or operative facts underlying Claim 3. *See Wood v. Ryan*, 693 F.3d 1104, 1120 (9th
 4 Cir. 2012) ("[A] general allegation of ineffective assistance of counsel is not sufficient to
 5 alert a state court to separate specific instances of ineffective assistance."); *Moormann v.*
 6 *Schriro*, 426 F.3d 1044, 1056 (9th Cir. 2005) (noting that a petitioner cannot add unrelated
 7 alleged instances of ineffectiveness to any ineffectiveness claim raised in state court).
 8 Because he has no available state court remedies, *see* Ariz. R. Crim. P. 32.2(b) and 32.1(d)-
 9 (h), Claim 3 is procedurally barred absent a showing of cause and prejudice or fundamental
 10 miscarriage of justice. *Coleman*, 501 U.S. at 732, 735 n.1.

11 *Cause and Prejudice*

12 Petitioner argues that the ineffective assistance of PCR counsel constitutes cause for
 13 the procedural default. In states like Arizona, which require that ineffective-assistance-of-
 14 trial-counsel claims be raised in an initial-review collateral proceeding, failure of counsel in
 15 an initial-review collateral proceeding to raise a substantial trial ineffectiveness claim may
 16 provide cause to excuse the procedural default of such a claim. *Martinez v. Ryan*, 132 S. Ct.
 17 1309, 1315 (2012). To establish cause under *Martinez*, Petitioner must demonstrate that PCR
 18 counsel was ineffective under the standards of *Strickland* for not raising a substantial
 19 ineffective-assistance-of-trial-counsel claim. This requires showing that the underlying
 20 ineffectiveness claim is "rooted in 'a potentially legitimate claim of ineffective assistance of
 21 trial counsel.'" *Lopez v. Ryan*, 678 F.3d 1131, 1138 (9th Cir. 2012) (citing *Martinez*, 132 S.
 22 Ct. at 1318). "To have a legitimate IAC claim a petitioner must be able to establish both
 23 deficient representation *and* prejudice." *Id.*; *see also Leavitt v. Arave*, 682 F.3d 1138, 1140
 24 (9th Cir. 2012); *Sexton v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012). Because the Court
 25 concludes that Petitioner "fails to meet the *Martinez* test of substantiality as to prejudice,"
 26
 27
 28

1 it does not address substantiality of the deficiency prong.⁶ *Lopez*, 678 F.3d at 1138; *see also*
 2 *Leavitt*, 682 F.3d at 1140 (finding no substantial ineffectiveness claims where record
 3 demonstrated no prejudice from alleged ineffectiveness).

4 Petitioner argues that his trial counsel was deficient for failing to interview
 5 Petitioner's children, interview Petitioner's wife, and enlist a forensic pathologist to opine
 6 about the unlikelihood the victim regained consciousness after being bludgeoned in the head.
 7 He asserts this investigation would have led him to discover that the victim was not
 8 conscious at the time of the rape or stabbing and, consequently, the sentencer would not have
 9 found that the murder was committed in an especially cruel manner under A.R.S. § 13-
 10 703(F)(6).

11 Petitioner does not specifically allege what would have been gained by counsel
 12 interviewing his children. With regard to his wife, Petitioner argues that on cross-
 13 examination counsel could have demonstrated the unreliability of Kara Sansing's testimony
 14 by eliciting the details of her statement to the police, which he describes as "unbelievable."
 15 (Doc. 35 at 88.) In support, he proffers a transcript of Kara's police interview, which
 16 contains the following exchange:

17 INT: Okay, you saw him having sex with her?

18 KS: Yes.

19 INT: Okay, were her pants down or just off or—?

20 KS: Pants down to her knees.

21 INT: Just down to her knees, okay. What was she saying?

22 KS: She asked him how it feels, and he says, well my wife's better. And
 23 hear what I'm saying, when I walked in when I heard her say that, and
 24 I just, looked at him Johnny, I says, you know, I can't believe you
 25 would say that to her, I mean, I want to say, say something like well,
 how would you feel if I was doing it to a guy, and asking a guy, or guy
 asking me, so what my husband's feels better, when you (inaudible)

26 ⁶ Nonetheless, the Court notes that the state court record reflects that defense counsel
 27 did, in fact, interview Petitioner's wife before the aggravation/mitigation hearing. At the
 28 hearing, Kara Sansing acknowledged a previous interview with Ronan and testified to
 statements she made at that time. (RT 8/2/99 at 78-79.)

1 making uncomfortable to hear you're wife's in another room and you're
2 doing it with another woman and you're murdering her?

3

4 INT: Okay. So he stabs her with this knife, uh, what does she do?

5 KS: She would just say, please don't, please don't, just let me go, I won't
6 call the cops. I won't do nothing, and he's like yes you will, yes you
7 will, as soon as you walk out of this house, you will call the cops.

8 (Doc. 53-2 at 14-15.)

9 Petitioner also points to declarations from Kara and Petitioner admitted during the
10 state PCR hearing and proffers a newly-obtained report from a forensic pathologist.
11 Petitioner's declaration states that he made false statements about the victim speaking during
12 the sexual assault so as to minimize risk of a jail assault and that Calabrese was not in fact
13 conscious when he returned from moving her truck. (Doc. 43-10 at 11-12.) In her
14 declaration, Kara denies hearing the victim speak during the sexual assault and says the "only
15 time she spoke was when she was being tied up in the kitchen area." (*Id.* at 5.) The forensic
16 pathologist opines that if the victim did regain consciousness, it likely would have been for
17 no more than five to ten minutes, during which her perception of pain and her ability to speak
18 cognitively likely would have been impaired given the brain damage she had sustained.
19 (Doc. 53-2 at 25.)

20 To establish prejudice from counsel's alleged deficiencies, Petitioner must show a
21 reasonable probability of a different outcome. For several reasons, there is no reasonable
22 probability the sentencer would not have found the (F)(6) "especially heinous, cruel or
23 depraved" aggravating factor. First, the new evidence Petitioner alleges counsel could have
24 presented is not significant. The new pathologist's report is not appreciably different from
25 the testimony of the medical examiner, who opined it was possible but doubtful the victim
26 regained consciousness. In addition, Petitioner's and Kara's post-conviction declarations
27 lack credibility in light of their self-serving nature and Petitioner's previous admissions to
28 the court and a newspaper reporter.

Second, even if Petitioner's new evidence raised a reasonable doubt as to whether the

1 victim regained consciousness, he cannot show prejudice because the sentencing judge found
2 beyond a reasonable doubt that the murder was committed in an especially heinous or
3 depraved manner. This finding alone, separate from cruelty, was sufficient to establish the
4 (F)(6) factor. *Sansing I*, 200 Ariz. at 356, 26 P.3d at 1127 (“Because the statute is written
5 in the disjunctive, the sentencing judge need find only one of the factors to establish an F.6
6 aggravating factor.”); *see also Sansing II*, 206 Ariz. at 237-38, 77 P.3d at 35-36 (concluding
7 that no reasonable jury would have failed to find that Calabrese’s murder was especially
8 heinous).

9 Third, in finding cruelty, the sentencing judge did not rely solely on the victim’s
10 physical pain and mental suffering during the rape and stabbing. The court found that
11 Calabrese consciously experienced physical pain during the initial attack, as indicated by the
12 ligature wounds and bruises on her wrists and ankles, the defensive wounds to her hands, the
13 trauma to her face, and the “two deep blows to the back of her head, which caused bruising
14 of the brain and hemorrhaging.” (RT 9/30/99 at 13.) It further found that Calabrese suffered
15 mental anguish, as demonstrated by her praying to God and pleading with Petitioner’s
16 children to summon help. There is no dispute that the victim was conscious throughout the
17 initial attack when she struggled against being tied up. Likewise, the Arizona Supreme Court
18 also found during its independent review that the cruelty prong had been established based
19 on the mental suffering that occurred between the beginning of the attack and the victim’s
20 loss of consciousness. *Sansing I*, 200 Ariz. at 358, 26 P.3d at 1128 (“The evidence shows
21 beyond a reasonable doubt that the victim was aware and had sufficient time to contemplate
22 her fate.”) Moreover, in reviewing the *Ring* violation for harmless error, the Arizona
23 Supreme Court expressly stated that cruelty had been established in three independent ways,
24 one being mental anguish during the initial attack. *Sansing II*, 206 Ariz. at 235-36, 77 P.3d
25 at 33-34.

26 Because Petitioner has not alleged facts that, even if true, support a finding of
27 prejudice from counsel’s failure to investigate and present evidence to rebut the (F)(6) factor,
28 the Court finds that it is not a substantial ineffectiveness claim. Therefore, PCR counsel’s

1 failure to raise Claim 3 in the PCR petition was not ineffective and does not provide cause
2 for its procedural default.

3 *Miscarriage of Justice*

4 Petitioner contends that a fundamental miscarriage of justice will occur if Claim 3 is
5 not heard on the merits because he is actually innocent of the death penalty. To satisfy this
6 exception to procedural default, Petitioner must show by clear and convincing evidence that,
7 but for constitutional error, no reasonable factfinder would have found the existence of *any*
8 aggravating circumstance or some other condition of eligibility for the death sentence under
9 the applicable state law. *Sawyer*, 505 U.S. at 335-36.

10 Petitioner argues that the (F)(6) aggravating factor would not have been established,
11 and thus Petitioner would not be eligible for the death penalty, if counsel had conducted a
12 proper investigation and rebutted the finding of consciousness. However, as already
13 explained, the state court's (F)(6) finding rested on both the cruelty and "heinous or
14 depraved" prongs, either of which rendered Petitioner eligible for the death penalty.
15 Accordingly, Petitioner has not established by clear and convincing evidence that he is
16 actually innocent of the death penalty.

17 *Evidentiary Development*

18 Because Claim 3 is procedurally barred, Petitioner's requests for discovery, expansion
19 of the record, and an evidentiary hearing are denied.

20 **C. Failure to Properly Advise**

21 In Claim 4, Petitioner alleges that had counsel properly advised him about the
22 consequences of his plea's stipulated factual basis and the sentencing stipulation, he would
23 not have signed these documents and the admissions contained therein would not have been
24 used by the prosecution to establish the cruelty prong of the (F)(6) aggravating factor.
25 Respondents acknowledge that Claim 4 was raised in Petitioner's PCR petition, but argue it
26 is procedurally defaulted because in his petition for review to the Arizona Supreme Court
27 Petitioner merely incorporated the arguments and authorities set forth in his PCR petition,
28 which he appended to his petition for review in lieu of restating the argument in the body of

1 the petition. However, the Ninth Circuit has held that this is sufficient to fairly present a
2 claim to an appellate court. *See Scott v. Schriro*, 567 F.3d 573, 582-83 (9th Cir. 2009).

3 The state PCR court denied relief on Claim 4 without explanation, stating that the
4 claim failed to present “a material issue of fact or law.” (Doc. 38-9 at 29.) The Arizona
5 Supreme Court summarily denied review. “Where a state court’s decision is unaccompanied
6 by an explanation, the habeas petitioner’s burden still must be met by showing there was no
7 reasonable basis for the state court to deny relief.” *Richter*, 131 S. Ct. at 784. In addition,
8 this Court must apply the “doubly deferential” standard of review under *Strickland* and
9 § 2254(d). *Id.* at 788. Doing so, and in light of the record that was before the state court, the
10 Court finds that the state court’s denial was not objectively unreasonable because
11 “fairminded jurists could disagree” on whether counsel’s performance was deficient or
12 Petitioner suffered prejudice. *Richter*, 131 S. Ct. at 786.

13 First, Petitioner stated during his change-of-plea hearing that he reviewed the factual
14 basis with counsel. Although Petitioner now asserts in his declaration that counsel did not
15 advise him of all the potential sentencing consequences from his admissions, it would not be
16 unreasonable to discount this evidence, especially in the absence (as here) of any evidence
17 relating to counsel’s recollections of their pre-plea discussions and in light of Petitioner’s
18 own admission in his declaration that he is not a truthful person. Second, the record suggests
19 that Petitioner did not want his children to be called as witnesses and therefore agreed to the
20 sentencing stipulation to minimize their involvement in the proceedings. Third, even if
21 Petitioner had refused to sign the factual basis or agreed to the sentencing stipulation, there
22 is no reasonable probability of a different outcome.

23 Kara Sansing testified at sentencing that she heard the victim speak during the sexual
24 assault. Had the parties not agreed to the sentencing stipulation, the prosecution likely would
25 have called as witnesses the reporter to whom Petitioner admitted that the victim had
26 regained consciousness, as well as Petitioner’s children. Moreover, as just discussed with
27 respect to Claim 3, the sentencing court determined that the (F)(6) factor was established
28 both because the crime was committed in a heinous and depraved manner and because it was

1 especially cruel. Either one of these prongs was sufficient to sustain the factor. In addition,
 2 the court found cruelty based on the mental anguish and physical pain suffered by the victim
 3 prior to losing consciousness.

4 **D. Cumulative Prejudice**

5 In Claim 5, Petitioner contends that trial counsel's errors resulted in cumulative
 6 prejudice. Respondents assert that this claim was never presented in state court. Regardless,
 7 because Petitioner has not established any constitutional deficiencies in counsel's
 8 representation, his claim of cumulative prejudice fails.

9 **IV. SENTENCING ERRORS**

10 **A. Causal Nexus**

11 In Claim 7, Petitioner alleges that his right to an individualized sentencing
 12 determination was violated when the trial court and the Arizona Supreme Court employed
 13 a causal nexus test to avoid giving effect to his mitigating evidence. Citing *Tennard v.*
 14 *Dretke*, 542 U.S. 274, 289 (2004), Petitioner asserts that the trial court improperly refused
 15 to give weight to his difficult childhood, dysfunctional family background, and family
 16 support, and that the Arizona Supreme Court similarly refused to give any weight to his
 17 alleged drug impairment, background, and lack of education when it reviewed the *Ring*
 18 violation for harmless error. Respondents assert that Petitioner did not properly exhaust all
 19 aspects of this claim. However, because the claim lacks merit, the Court declines to reach
 20 the exhaustion issue. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas
 21 corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust
 22 the remedies available in the courts of the State."); *Rhines v. Weber*, 544 U.S. 269, 277
 23 (2005) (noting that a district court would abuse its discretion if it were to grant a stay so that
 24 a petitioner could attempt to exhaust "plainly meritless" claims).

25 Relevant Facts

26 On direct appeal, Petitioner argued that the trial court violated his constitutional rights
 27 by refusing to consider his difficult childhood and dysfunctional family background absent
 28 a causal link to the offense. (Doc. 37-2 at 50-56.) The Arizona Supreme Court addressed

1 this claim as follows:

2 The defendant proffered his difficult childhood and family background
 3 as non-statutory mitigating circumstances. At sentencing, the judge held that
 4 the defendant had established by a preponderance of the evidence that he had
 5 a difficult childhood and family background but declined to give the evidence
 6 “significant mitigating weight” because “there [was] nothing in the defendant’s
 7 childhood or family background that provides a causal link to the horrific
 crime committed.” The defendant argues the judge’s refusal to give the
 evidence significant weight due to a lack of a causal nexus violates his due
 process and Eighth Amendment rights under *Penry v. Lynaugh*, 492 U.S. 302,
 109 S. Ct. 2934 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869
 (1982); and *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978).

8 We have previously considered and rejected this argument. We have
 9 interpreted *Penry*, *Eddings*, and *Lockett* as directing the sentencing judge to
 “consider evidence proffered for mitigation.” *State v. Djerf*, 191 Ariz. 583,
 598 ¶ 61, 959 P.2d 1274, 1289 ¶ 61 (1998) (with respect to mitigating
 10 evidence, the sentencing judge is “entitled to give it the weight it deserves”);
 11 *see also State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996) (“The
 12 sentencer therefore must consider the defendant’s upbringing if proffered but
 is not required to give it significant mitigating weight.”). However, “[h]ow
 13 much weight should be given proffered mitigating factors is a matter within
 the sound discretion of the sentencing judge.” *Towery*, 186 Ariz. at 189, 920
 P.2d at 311.

14 “Arizona law states that a difficult family background is not relevant
 15 unless the defendant can establish that his family experience is linked to his
 16 criminal behavior.” *Djerf*, 191 Ariz. at 598 ¶ 61, 959 P.2d at 1289 ¶ 61; *see*
 17 *also State v. Hoskins*, 199 Ariz. 127, 151 ¶ 110, 14 P.3d 997, 1021 ¶ 110
 18 (2000) (Family dysfunction “can be mitigating only when actual causation is
 19 demonstrated between early abuses suffered and the defendant’s subsequent
 20 acts.”); *Towery*, 186 Ariz. at 189, 920 P.2d at 311 (“family background may
 21 be a substantial mitigating circumstance when it is shown to have some
 22 connection with the defendant’s offense-related conduct”); *State v. Wallace*,
 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989) (“A difficult family background
 is a relevant mitigating circumstance if a defendant can show that something
 in that background had an effect or impact on his behavior that was beyond the
 defendant’s control.”). No testimony suggested that the defendant’s childhood
 affected his behavior on the day of the murder. The evidence on this subject
 did not “prove a loss of impulse control or explain what caused him to kill.”
Towery, 186 Ariz. at 189, 920 P.2d at 311. The sentencing judge properly
 considered the defendant’s difficult childhood as a non-statutory mitigating
 circumstance and gave the evidence appropriate weight.

23 *Sansing I*, 200 Ariz. at 358-59, 26 P.3d at 1129-30.

24 As discussed above, in reviewing for harmless error following *Ring*, the Arizona
 25 Supreme Court, assessed the evidence and agreed with the trial court that the (G)(1) factor
 26 was not proved and that the non-statutory mitigating evidence was entitled to little weight.
 27 *Sansing II*, 206 Ariz. at 238-41, 77 P.3d at 36-39. In making these determinations the court
 28

1 noted that Petitioner “failed entirely to show any causal nexus between his alleged drug use
2 and impairment.” *Id.* at 239, 77 P.3d at 37. This, combined with Petitioner’s failure to
3 quantify how much crack he had used along with evidence of planning and taking steps to
4 avoid detection, led the court to conclude that Petitioner had failed to prove the existence of
5 the (G)(1) substantial impairment factor. When the court later discussed impairment as a
6 non-statutory mitigating circumstance, it found based on its previous discussion of (G)(1)
7 that “no reasonable jury could have accorded the impairment claim more than minimal
8 weight.” *Id.* at 240-41, 77 P.3d at 38-39. The court also noted that Petitioner had failed to
9 “demonstrate any causal link between his crimes and his childhood and lack of education.”
10 *Id.* at 241, 77 P.3d at 39. Therefore, “a reasonable jury could have accorded these two
11 factors only minimal weight.” *Id.* Petitioner sought rehearing, arguing *inter alia* that a
12 causal nexus is not required to establish mitigation. (Doc. 38-3 at 54.) The Arizona Supreme
13 Court, evenly divided on a 2-2 vote, summarily denied the motion. (Doc. 38-4 at 2.)

14 Analysis

15 Once a determination is made that a person is eligible for the death penalty, the
16 sentencer must consider relevant mitigating evidence, allowing for “an individualized
17 determination on the basis of the character of the individual and the circumstances of the
18 crime.” *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). The Supreme Court has explained
19 that “evidence about the defendant’s background and character is relevant because of the
20 belief, long held by this society, that defendants who commit criminal acts that are
21 attributable to a disadvantaged background may be less culpable than defendants who have
22 no such excuse.” *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (quoting *Penry v. Lynaugh*,
23 492 U.S. 302, 319 (1989)). Therefore, the sentencer in a capital case is required to consider
24 any mitigating information offered by a defendant, including non-statutory mitigation. *See*
25 *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (right to individualized sentencing in capital cases
26 violated by Ohio statute that permitted consideration of only three mitigating factors);
27 *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982) (*Lockett* violated where state courts
28 refused as a matter of law to consider mitigating evidence that did not excuse the crime).

1 In *Lockett* and *Eddings*, the Court held that under the Eighth and Fourteenth
2 Amendments the sentencer must be allowed to consider, and may not refuse to consider, “any
3 aspect of a defendant’s character or record and any of the circumstances of the offense that
4 the defendant proffers as a basis for a sentence less than death.” *Lockett*, 438 U.S. at 604.
5 However, while the sentencer must not be foreclosed from considering relevant mitigation,
6 “it is free to assess how much weight to assign such evidence.” *Ortiz v. Stewart*, 149 F.3d
7 923, 943 (9th Cir. 1998). As the *Eddings* court explained: “The sentencer . . . may determine
8 the weight to be given relevant mitigating evidence. But they may not give it no weight by
9 excluding such evidence from their consideration.” 455 U.S. at 114-15.

10 In *Tennard v. Dretke*, the Court reiterated the general principle that it is not enough
11 simply to allow a defendant to present mitigating evidence, the sentencer must be able to
12 consider and give effect to that evidence. 542 U.S. 274, 283 (2004). In that case, involving
13 a prisoner’s low IQ, the Court invalidated a “screening test” applied by the Fifth Circuit that
14 required the defendant to prove a “nexus” between mitigating evidence and the offense in
15 order for the evidence to be considered by the sentencer.

16 In *Schad v. Ryan*, the Ninth Circuit observed that prior to *Tennard* Arizona courts
17 recognized a nexus test to preclude consideration of evidence of childhood abuse unless the
18 abuse bore a casual connection to the offense. 671 F.3d 708, 723 (9th Cir. 2011), *cert.*
19 *denied*, 133 S. Ct. 432 (2012). “After *Tennard*, however, the Arizona Supreme Court has
20 clarified that the nexus test affects only the weight of mitigating evidence, not its
21 admissibility.” *Id.* (citing *State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006)).
22 The *Schad* court further observed that the “United States Supreme Court has said that the use
23 of the nexus test in this manner is not unconstitutional because state courts are free to assess
24 the weight to be given to particular mitigating evidence.” 671 F.3d at 723. Indeed, the
25 Supreme Court has held that there is no constitutional requirement of unfettered discretion
26 in the sentencer, noting that “States are free to structure and shape consideration of mitigating
27 evidence ‘in an effort to achieve a more rational and equitable administration of the death
28 penalty.’” *Boyde v. California*, 494 U.S. 370, 377 (1990) (quoting *Franklin v. Lynaugh*, 487

1 U.S. 164, 181 (1988) (plurality opinion)). It has further explained that “*Lockett* and its
2 progeny stand only for the proposition that a State may not cut off in an absolute manner the
3 presentation of mitigating evidence, either by statute or judicial instruction, or by limiting
4 the inquiries to which it is relevant so severely that the evidence could never be part of the
5 sentencing decision at all.” *Johnson v. Texas*, 509 U.S.350, 361-62 (1993) (quoting *McKoy*
6 *v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment)). Thus,
7 “[a]lthough *Lockett* and *Eddings* prevent a State from placing relevant mitigating evidence
8 ‘beyond the effective reach of the sentencer,’ *Graham v. Collins*, [506 U.S. 461, 475 (1993)],
9 those cases and others in that decisional line do not bar a State from guiding the sentencer’s
10 consideration of mitigating evidence.” *Id.* at 362; *see Saffle v. Parks*, 494 U.S. 484, 492-93
11 (1990) (holding that an instruction directing the jury to avoid any influence of sympathy
12 when imposing sentence did not violate *Lockett* and *Eddings* and noting the “distinction
13 between allowing the jury to consider mitigating evidence and guiding their consideration”).

14 Applying these principles, it is apparent in Petitioner’s case that the trial court fulfilled
15 its constitutional obligation by allowing and considering all of the mitigating evidence, and
16 that the Arizona Supreme Court’s decision rejecting Petitioner’s arguments to the contrary
17 was neither contrary to, nor based on an unreasonable application of, Supreme Court law.
18 The record supports the conclusion that the state courts gave Petitioner’s drug impairment,
19 difficult childhood, lack of education, and family support “little or no weight as a matter of
20 *fact*, after giving individualized consideration to the evidence, rather than treating the
21 evidence as irrelevant or nonmitigating as a matter of law.” *Towery v. Ryan*, 673 F.3d 933,
22 946 (9th Cir.), *cert. denied*, 132 S. Ct. 1738 (2012); *see also Lopez v. Ryan*, 630 F.3d 1198,
23 1203 (9th Cir.), *cert. denied*, 132 S. Ct. 577 (2011) (reviewing record to determine whether
24 state court applied impermissible casual nexus requirement). The trial court thoroughly
25 discussed the mitigating circumstances presented at sentencing and did not exclude or refuse
26 to consider any mitigating evidence. The court did not state that the lack of a causal
27 connection foreclosed consideration of the evidence or that such evidence could not
28 “constitute” mitigation. Rather, it chose to not to give “significant mitigating weight to the

1 defendant's childhood and family background." (RT 9/30/99 at 21.) Similarly, the court
2 found family love and support to be a non-statutory mitigating circumstance, but gave it
3 "only minimal weight because it did not prevent the defendant from committing" the offense
4 or victimizing his children. (*Id.* at 22.)

5 On appeal, the Arizona Supreme Court correctly recognized that the sentencing court
6 was required to "consider evidence proffered for mitigation" but further noted that the
7 amount of weight that should be given to such evidence "is a matter within the sound
8 discretion of the sentencing judge." *Sansing I*, 200 Ariz. at 358, 26 P.3d at 1129. It
9 concluded that the "sentencing judge properly considered the defendant's difficult childhood
10 as a non-statutory mitigating circumstance and gave the evidence appropriate weight." *Id.*
11 at 359, 26 P.3d at 1130. This was not contrary to Supreme Court precedent. *See Lopez*, 673
12 F.3d at 944-45.

13 In conducting its own independent review of Petitioner's sentence, the supreme court
14 disagreed with the trial court's finding of pecuniary gain as an aggravating factor but
15 nonetheless concluded that the mitigation failed to outweigh the especially cruel aggravating
16 factor because of the "minimal value of the mitigating evidence." *Sansing II*, 200 Ariz. at
17 360, 26 P.3d at 1132. In doing so, the court again noted that the trial judge "gave the
18 defendant's difficult family background *little mitigating weight* because the defendant failed
19 to establish the required causal link." *Id.* (emphasis added). Furthermore, in carrying out its
20 harmless error review of Petitioner's sentence, the Arizona Supreme Court considered and
21 evaluated all of the proffered mitigating circumstances to determine whether a jury would
22 have reached a different sentencing decision than the trial judge. The court cited the lack of
23 a nexus between the mitigating circumstances and the crime simply as one of the criteria by
24 which a jury would have *weighed* the mitigating information. *Sansing II*, 206 Ariz. at 240-
25 41, 77 P.3d at 38-39.

26 It is evident from the record that both the trial court and the Arizona Supreme Court
27 considered all of Petitioner's proffered mitigation. The fact that some of the proven
28 circumstances were not accorded significant weight does not amount to a constitutional

violation under *Lockett* and *Eddings*. *Towery*, 673 F.3d at 945; *Schad*, 671 F.3d at 724; *Lopez*, 630 F.3d at 1204; *see also Atkins v. Singletary*, 965 F.2d 952, 962 (11th Cir. 1992) (“Although *Atkins* argues that the trial judge did not *consider* non-statutory factors, it is more correct to say that the trial judge did not *accept*—that is, give much weight to—*Atkins*’ non-statutory factors. Acceptance of non-statutory mitigating factors is not constitutionally required; the Constitution only requires that the sentencer *consider* the factors.”); *State v. Mata*, 185 Ariz. 319, 331 n.6, 916 P.2d 1035, 1047 (1996) (“Defendant seems to believe that a trial court only ‘considers’ mitigating evidence if it imposes a mitigated sentence. The law is to the contrary. So long as the trial court considers the evidence, the judge is not bound to conclude that the evidence calls for leniency.”).

B. (F)(6) Finding

In Claim 9, Petitioner contends that the trial court erred in finding the especially heinous, cruel, or depraved aggravating factor under A.R.S. § 13-703(F)(6), in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments. Respondents contend that the Fifth and Fourteenth Amendment aspects of this claim are procedurally barred because Petitioner did not cite these provisions when raising the claim on direct appeal. Regardless, the Court will address the entirety of the claim because it is plainly meritless. *See* 28 U.S.C. § 2254(b)(2); *Rhines v. Weber*, 544 U.S. at 277.

Whether a state court correctly applied an aggravating factor to the facts is a question of state law. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Federal habeas review is limited to determining whether the state court’s finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. *Id.* A state court’s finding of an aggravating factor is arbitrary or capricious only if no reasonable sentencer could have reached the same conclusion. *Id.* at 783. In reviewing the sufficiency of the evidence under this “rational factfinder” standard, the question is “whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact” could have made the finding beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A habeas court faced with a record of historical facts which supports conflicting inferences

1 must presume (even if it does not appear in the record) that the trier of fact resolved any such
2 conflicts in favor of the prosecution. *Id.* at 326.

3 Arizona's (F)(6) aggravating factor, phrased in the disjunctive, is satisfied if the
4 murder is either especially heinous, or cruel, or depraved. *State v. Murray*, 184 Ariz. 9, 37,
5 906 P.2d 542, 570 (1995). The especially cruel prong is satisfied "if the victim consciously
6 experienced physical or mental pain and suffering prior to dying." *State v. Lopez*, 174 Ariz.
7 131, 143, 847 P.2d 1078, 1090 (1992). Evidence about "[a] victim's certainty or uncertainty
8 as to his or her ultimate fate can be indicative of cruelty and heinousness." *State v. Gillies*,
9 142 Ariz. 564, 569, 691 P.2d 655, 660 (1984); *see also State v. Kemp*, 185 Ariz. 52, 65, 912
10 P.2d 1281, 1294 (1996). Heinousness and depravity focus the defendant's state of mind.
11 *State v. Ceja*, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980). Factors supporting a finding that
12 a murder was heinous and depraved include the infliction of gratuitous violence and
13 helplessness of the victim. *See Gretzler*, 135 Ariz. at 52, 659 P.2d at 11.

14 As set forth above, the trial court found that the State had proven both cruelty and
15 heinousness/depravity beyond a reasonable doubt. On direct appeal, the Arizona Supreme
16 Court concurred with the trial court's cruelty findings and rejected Petitioner's argument that
17 the victim had not been conscious long enough to suffer within the meaning of (F)(6).
18 *Sansing I*, 200 Ariz. at 357, 26 P.3d at 1128. The court also rejected Petitioner's argument
19 that the time frame between the beginning of the attack and the victim's initial loss of
20 consciousness was too short to support a finding of cruelty. *Id.* Because it concurred in the
21 trial court's cruelty findings, the supreme court declined to address the question of
22 heinousness or depravity. *Id.* However, it did address this aspect of the (F)(6) finding when
23 it reviewed the *Ring* violation for harmless error, finding that the rape, facial wounds, neck
24 ligatures, gagging, blindfolding, and grinding of the knife in the victim's abdomen all
25 constituted violence beyond that necessary to kill. *Sansing II*, 206 Ariz. at 238, 77 P.3d at
26 36.

27 Petitioner argues that the facts do not support a conclusion that the victim regained
28 consciousness after being hit in the head. Similar to his arguments in Claim 1, Petitioner

1 argues that Kara Sansing's statements to police are unreliable and that Petitioner did not
2 knowingly, intelligently, and voluntarily make the admissions contained within the factual
3 basis of his plea. He further argues that a finding of cruelty could not be based on the limited
4 time the victim was known to be conscious before the first blow to her head, asserting that
5 under Arizona law the suffering had to have occurred at the time of death.

6 To the extent Petitioner relies on new evidence regarding the victim's consciousness,
7 the Court does not consider it because a sufficiency-of-the-evidence claim is necessarily
8 limited to the state court record. *See Jackson*, 443 U.S. at 322 (this type of claim almost
9 never necessitates an evidentiary hearing); *Bashor v. Risley*, 730 F.2d 1228, 1233 (9th Cir.
10 1984) ("Whether the evidence was sufficient . . . must be determined from a review of the
11 evidence in the record in the *state* proceedings.").

12 Viewed in the light most favorable to the State, there was sufficient evidence to
13 establish cruelty. Based upon the evidence admitted at the sentencing hearing, a rational
14 factfinder could have determined from the numerous injuries sustained during the initial
15 struggle and from her pleas for help that the victim suffered mental anguish and uncertainty
16 as to her fate when she was attacked, pinned to the floor, and bound at her hands and wrists.
17 Moreover, given the uncontradicted testimony of Kara Sansing and Petitioner's admissions
18 that the victim regained consciousness, a rational factfinder could have determined that the
19 victim suffered both mentally and physically when she was sexually assaulted and repeatedly
20 stabbed. The Arizona Supreme Court's decision upholding the cruelty finding was not
21 objectively unreasonable. *See Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) (applying deference
22 required by § 2254(d) to already deferential review of state court's resolution of sufficiency-
23 of-evidence claim).

24 Petitioner also challenges the trial court's finding that the murder was committed in
25 an especially heinous or depraved manner, arguing there was insufficient evidence that
26 gratuitous violence was inflicted. However, a rational trier of fact could have found
27 gratuitous violence based on the numerous injuries to the victim beyond the stab wounds.
28 The Arizona Supreme Court's decision upholding this aspect of the (F)(6) factor was not

1 objectively unreasonable.

2 **C. (G)(1) Finding**

3 In Claim 10, Petitioner alleges that the trial court erred in not finding as mitigation
4 that his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the
5 law was significantly impaired under A.R.S. § 13-703(G)(1), in violation of his rights under
6 the Eighth and Fourteenth Amendments. (Doc. 35 at 117.) However, in his reply, Petitioner
7 asserts that this claim is based on the mitigating weight accorded by the state court to the
8 evidence of his impaired capacity. (Doc. 51 at 55.) Regardless of how the claim is
9 characterized, it is plainly meritless.

10 The Supreme Court has reiterated that its “precedents confer upon defendants the right
11 to present sentencers with information relevant to the sentencing decision and oblige
12 sentencers to consider that information in determining the appropriate sentence,” but that the
13 “thrust of our mitigation jurisprudence ends here.” *Kansas v. Marsh*, 548 U.S. 163, 175
14 (2006). “Once mitigating evidence is allowed in, a finding that there are “no mitigating
15 circumstances” does not violate the Constitution.” *Williams v. Stewart*, 441 F.3d 1030, 1057
16 (9th Cir. 2006).

17 Applying the rule of *Lockett* and its progeny to the case at bar, it is clear that the
18 sentencing court complied with its federal constitutional duties by considering in a thorough
19 manner Petitioner’s impairment-related mitigating evidence. *Eddings*, 455 U.S. at 113. The
20 court specifically stated that it gave some mitigating weight to Petitioner’s claim that he was
21 impaired by crack cocaine at the time of the crime. That the court found the evidence
22 insufficient to establish significant impairment under (G)(1) is not problematic in light of the
23 settled principle that a sentencer is not required to find proffered evidence mitigating, nor
24 must it accord the evidence the weight which a defendant believes is appropriate. *Harris v.*
25 *Alabama*, 513 U.S. 504, 512 (1995).

26 **D. Victim’s Character**

27 In Claim 11, Petitioner asserts that the trial court improperly considered the victim’s
28 good character in imposing the death penalty, in violation of his rights under the Eighth and

1 Fourteenth Amendments. The Arizona Supreme Court addressed this claim on direct appeal:

2 The defendant asserts that the judge improperly based his sentencing
3 decision on Ms. Calabrese's good character. In his special verdict, the judge
4 referred to the victim as a "Good Samaritan" and as a person who "took great
5 joy in helping people in need." The judge's concluding remarks, after
6 considering all aggravating and mitigating factors, described Ms. Calabrese as
7 a person who "stood out like a shining light, as a true Samaritan" and who
8 "kept her faith in God to the end." The defendant argues that the judge
imposed the death sentence because he viewed the victim as a person above
the norm of other murder victims. That approach, he argues, violates A.R.S.
section 13-703, which does not define the character of the victim as an
aggravating factor, and discriminates on the basis of the victim's status.
A.R.S. § 13-703.A H (2001).

9 We agree with the State that the judge's comments, taken in context, do
10 not show that the trial judge relied upon the victim's good character in
11 imposing the sentence. Taken in context, the comments merely state the
12 judge's summary of the aggravating factors, particularly the senselessness of
the crime and the helplessness of the victim. The fact that the victim was
delivering food when attacked is related to the senselessness of the crime; the
judge's comments related to "resorting to prayer for comfort" describe the
helplessness of the victim after she had been beaten and bound.

13 The defendant relies on *Gerlaugh v. Lewis*, 898 F.Supp. 1388
14 (D.Ariz.1995), *aff'd* 129 F.3d 1027 (9th Cir.1997), to support his argument that
15 imposing a death sentence based on the social or economic background of the
16 victim or defendant supports a claim of discrimination. In *Gerlaugh*, the
17 habeas petitioner alleged that Arizona's death sentence is "discriminately
18 applied because the death penalty is more likely to be imposed if the victim is
19 white and the defendant is a young male from a lower socio-economic
20 background." *Gerlaugh*, 898 F.Supp. at 1416. The court stated that "[t]o
prevail on an equal protection claim, Petitioner must prove 'that the
decision-makers in *his* case acted with discriminatory purpose.'" *Id.* (citing
McCleskey v. Kemp, 481 U.S. 279, 292, 107 S. Ct. 1756 (1987)). The
defendant points to no facts that support a finding that the trial judge acted
with discriminatory purpose, and nothing in the special verdict suggests that
the victim's social or economic background affected the judge's decision.

21 *Sansing I*, 200 Ariz. at 352-53, 26 P.3d at 1123-24.

22 Petitioner asserts summarily that the state court's ruling was both contrary to and an
23 unreasonable application of clearly established federal law, and was based on an
24 unreasonable determination of the facts. He argues that the trial court's reliance on the
25 victim's character "so infected the sentence hearing with unfairness as to make the resulting
26 death sentence a denial of due process." (Doc. 35 at 121; internal quote and alteration marks
27 omitted.) He further asserts that the trial court's consideration of the victim's character and
28 status in the community resulted in the death penalty being imposed in a discriminatory

1 manner.

2 The Arizona Supreme Court's resolution of this claim was neither objectively
3 unreasonable nor contrary to controlling Supreme Court law. The supreme court reasonably
4 concluded based on the record that the trial court's comments regarding the victim's good
5 character reflected the judge's determination that the murder was committed in an especially
6 heinous, cruel, or depraved manner under A.R.S. § 13-703(F)(6) because the victim was
7 helpless and the crime was senseless. The fact that the victim went to Petitioner's home to
8 deliver food from her church underscored both of these factors—she simply had no reason
9 to suspect Petitioner would attack, rob, and rape her. Additionally, the state supreme court
10 reasonably concluded that Petitioner had failed to demonstrate purposeful discriminatory
11 intent.

12 **E. Request for Leniency**

13 In Claim 12, Petitioner contends that his rights under the Eighth and Fourteenth
14 Amendments were violated when the trial court failed to find and consider as mitigation the
15 victim's daughter's request that Petitioner not be sentenced to death. The Arizona Supreme
16 Court addressed this claim on direct appeal:

17 At sentencing, the judge considered and rejected the request of the
18 victim's ten-year-old daughter for mercy as a mitigating circumstance. The
19 defendant asserts the judge thereby violated the rights of a victim to be heard,
20 as guaranteed by Article 2, Section 2.1.(A)4 of the Arizona Constitution,
21 A.R.S. section 13-4426.A, and Arizona Rule of Criminal Procedure 39.b.7.
22 The State responds that a victim's rights are satisfied when the court gives the
23 victim a chance to speak, orally or in writing, at sentencing. *See Gulbrandson*,
184 Ariz. at 66, 906 P.2d at 599 ("The Victims' Bill of Rights of the Arizona
Constitution, however, guarantees victims of crime the right '[t]o be heard at
... sentencing.' [Citation omitted.] Here, the victim's family made statements
at the sentencing hearing and in letters and statements attached to the
presentence report.").

24 In *State v. Trostle*, we rejected the defendant's argument. There, the
25 defendant "claim[ed] that the judge should have considered requests from the
26 victim's family that he be sentenced to life imprisonment [rather than death]." 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997). We disagreed, stating "such
27 evidence is irrelevant to either the defendant's character or the circumstances
28 of the crime and is therefore not proper mitigation." *Id.* (citing *State v. Williams*, 183 Ariz. 368, 385, 904 P.2d 437, 454 (1995)). Moreover, A.R.S. section 13-703.D expressly forbids the consideration of "any recommendation made by the victim regarding the sentence to be imposed."

1 In this case, the victim's rights were satisfied by the presence of Mr.
2 Calabrese at the sentencing hearing and the court's acceptance of documents
3 submitted by the victim's daughter. The judge correctly refused to consider
4 the daughter's sentencing recommendation when imposing the sentence.

5 *Sansing I*, 200 Ariz. at 358, 26 P.3d at 1129.

6 In reviewing the *Ring* error for harmless error, the Arizona Supreme Court ruled that
7 no reasonable jury could have accorded mitigating weight to the request for leniency because
8 a "victim's sentencing request is not proper mitigation evidence." *Sansing II*, 206 Ariz. at
9 241, 77 P.3d at 39. The court cited its earlier decision in *Lynn v. Reinstein*, 205 Ariz. 186,
10 68 P.3d 412, (2003), in which a murder victim's husband asserted a right under Arizona's
11 Victims' Bill of Rights to recommend life imprisonment over the death penalty during the
12 sentencing phase of a defendant's trial. Citing *Booth v. Maryland*, 482 U.S. 496, 509 (1987),
13 and *Payne v. Tennessee*, 501 U.S. 808, 825, 827 (1991), the court in *Lynn* held that the
14 Eighth Amendment prohibits victims' recommendations regarding the appropriate sentence
15 for a capital defendant. 205 Ariz. at 191, 68 P.3d at 417. It further held that [v]ictims'
16 recommendations to the jury regarding the appropriate sentence a capital defendant should
17 receive are not constitutionally relevant to the harm caused by the defendant's criminal acts
18 or to the defendant's blameworthiness or culpability." *Id.*

19 Petitioner argues that the state court's ruling was contrary to, and based on an
20 unreasonable application of, *Lockett, Eddings*, and *Skipper v. South Carolina*, 476 U.S. 1,
21 4 (1986), because the recommendation of a life sentence from the victim's daughter was
22 relevant mitigating evidence. He further asserts, citing *Brecht v. Abrahamson*, 507 U.S. 619,
23 623 (1993), that this error had a substantial and injurious effect on his sentence.

24 In *Skipper*, the Court restated the well-settled rule of *Eddings* that a sentencer must
25 consider as a mitigating factor "any aspect of a defendant's character or record and any of
26 the circumstances of the offense that the defendant proffers as a basis for a sentence less than
27 death." 476 U.S. at 4. "Equally clear is the corollary rule that the sentencer may not refuse
28 to consider or be precluded from considering 'any relevant mitigating evidence.'" *Id.* (citing
 Eddings, 455 U.S. at 114).

1 Petitioner here argues that a victim’s favorable sentencing recommendation is relevant
2 because it has mitigating value and could be found by a sentencer to warrant a sentence less
3 than death. The Arizona Supreme Court determined that such evidence is not relevant as
4 mitigation. The United States Supreme Court has not addressed the issue or ever held that
5 a victim’s recommendation of leniency constitutes relevant mitigation. Thus, Petitioner
6 cannot show that the Arizona Supreme Court’s decision was contrary to or based on an
7 unreasonable application of “clearly established Federal law,” as determined by the Supreme
8 Court. 28 U.S.C. § 2254(d)(1); *see, e.g., Thaler v. Haynes*, 130 S. Ct. 1171, 1174 (2010)
9 (finding that no decision of the Court clearly established “that a demeanor-based explanation
10 for a peremptory challenge must be rejected unless the judge personally observed and recalls
11 the relevant aspect of the prospective juror’s demeanor”); *Carey v. Musladin*, 549 U.S. 70,
12 77 (2006) (finding that no decision of the Court clearly established “the potential prejudicial
13 effect of spectators’ courtroom conduct”); *see also Mirzayance*, 129 S. Ct. at 1413-14 (“[I]t
14 is not an unreasonable application of clearly established Federal law for a state court to
15 decline to apply a specific legal rule that has not been squarely established by this Court.”)
16 (internal quotation marks omitted).

17 Furthermore, the Supreme Court has held that the Eighth Amendment bars the
18 admission of a victim’s family members’ opinions about the appropriate sentence in a capital
19 case. In *Booth*, the Court held that introduction of a victim impact statement during the
20 sentencing phase of a capital case violated the Eighth Amendment. 482 U.S. at 509. In
21 *Payne*, the Court overruled *Booth*, in part, holding that the Eighth Amendment does not erect
22 a *per se* barrier to the admission of all victim impact evidence. 501 U.S. at 827. However,
23 the *Payne* decision retained *Booth*’s prohibition on admitting “characterizations and
24 opinions” from the victim’s family “about the crime, the defendant, and the appropriate
25 sentence.” *Id.* at 830 n.2; *see also Booth*, 482 U.S. at 508-09 (“The admissions of these
26 emotionally charged opinions as to what conclusions the jury should draw from the evidence
27 clearly is inconsistent with the reasoned decisionmaking we require in capital cases.”).
28 Given this general prohibition on victim testimony regarding the “appropriate sentence” for

1 a capital defendant, the Court cannot say that the Arizona Supreme Court's failure to
 2 recognize an exception for "favorable" sentencing recommendations constituted an
 3 unreasonable application of *Booth* and *Payne*.

4 **F. Cumulative Error**

5 In Claim 13, Petitioner alleges that was he was prejudiced by the cumulative effect
 6 of errors committed during his guilty plea and sentencing hearings. Respondents contend
 7 that the claim was never presented in state court and therefore is procedurally defaulted
 8 because Petitioner has no available state court remedies. Petitioner counters that he
 9 exhausted the claim by identifying the individual errors in state court, thereby affording the
 10 court an opportunity to consider his claim of cumulative error. The Court disagrees and
 11 concludes that Petitioner failed to fairly present his cumulative error claim in state court.
 12 *See, e.g., Jimenez v. Walker*, 458 F.3d 130, 148-49 (2d Cir. 2006) (finding cumulative error
 13 claim not properly exhausted). Petitioner alleges neither cause and prejudice nor a
 14 fundamental miscarriage of justice to excuse the default. Therefore, the claim is barred.

15 The claim is also meritless. "Because there is no single constitutional error in this
 16 case, there is nothing to accumulate to the level of a constitutional violation." *Mancuso v.*
 17 *Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002).

18 **V. REMAINING CLAIMS**

19 **A. Ineffective Assistance of PCR Counsel**

20 In Claim 6, Petitioner alleges that he was denied the effective assistance of counsel
 21 during his state post-conviction proceedings. However, there is no constitutional right to
 22 counsel in state collateral review proceedings. *See Coleman*, 501 U.S. at 752 (citing
 23 *Pennsylvania v. Finley*, 481 U.S. 551 (1987)); *see also Martinez*, 132 S. Ct. at 1315
 24 (declining to decide whether a prisoner has a right to effective counsel in collateral
 25 proceedings which provide the first occasion to raise a claim of ineffective assistance at trial).
 26 Where there is no right to counsel there can be no deprivation of effective assistance of
 27 counsel. *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982). Consequently, Petitioner cannot
 28 claim constitutionally ineffective assistance of counsel in state post-conviction collateral

proceedings. *See Coleman*, 501 U.S. at 752; *Campbell v. Wood*, 18 F.3d 662, 677 (9th Cir. 1994) (en banc). Further, this claim is not cognizable: “The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.” 28 U.S.C. § 2254(I). For these reasons, Petitioner’s request for evidentiary development of Claim 6 is denied.

B. Challenges to Arizona’s Death Penalty

In Claims 14-26, Petitioner asserts various challenges to Arizona’s capital sentencing statutory scheme. Respondents assert that some were not properly exhausted in state court and are now procedurally barred. Regardless, the Court will address the claims because each is plainly meritless. *See* 28 U.S.C. § 2254(b)(2); *Rhines v. Weber*, 544 U.S. at 277.

Petitioner asserts that the death penalty is categorically cruel and unusual punishment (Claim 15), but acknowledges that the Supreme Court held otherwise in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

Petitioner contends that Arizona’s capital sentencing scheme fails to sufficiently channel the sentencer’s discretion (Claim 14), provide an opportunity to “death qualify” the sentencing judge (Claim 17), provide objective standards for weighing aggravation and mitigation (Claim 18), require the cumulative consideration of all mitigating evidence (Claim 20) and proportionality review (Claim 25), and require the prosecution to obtain probable cause findings for aggravating factors at the indictment stage (Claim 26) and to prove that death is the appropriate sentence (Claim 21). He further argues that Arizona law unconstitutionally requires a death sentence if no mitigating circumstances are found (Claim 16), requires a defendant to affirmatively prove that his life should be spared (Claim 19), requires that mitigating factors be proven by a preponderance of the evidence (Claim 23), and provides unbridled discretion for prosecutors to seek the death penalty (Claim 24). In addition, he asserts that the (F)(6) “heinous, cruel, or depraved” aggravating factor fails to genuinely narrow the class of offenders eligible for the death penalty (Claim 22).

Rulings of both the Ninth Circuit and the United States Supreme Court have upheld Arizona’s death penalty statute against allegations that particular aggravating factors,

1 including the (F)(6) factor, do not adequately narrow the sentencer's discretion. *See Jeffers*,
2 497 U.S. at 774-77; *Walton v. Arizona*, 497 U.S. 639, 652-56 (1990), *overruled on other*
3 *grounds by Ring v. Arizona*, 536 U.S. 584 (2002); *Woratzek v. Stewart*, 97 F.3d 329, 334-35
4 (9th Cir. 1996). The Ninth Circuit has also explicitly rejected the contention that Arizona's
5 death penalty statute is unconstitutional because it "does not properly narrow the class of
6 death penalty recipients." *Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998).

7 In *Walton*, the Supreme Court rejected the argument that "Arizona's allocation of the
8 burdens of proof in a capital sentencing proceeding violates the Constitution." 497 U.S. at
9 651. *Walton* also rejected the claim that Arizona's death penalty statute is impermissibly
10 mandatory and creates a presumption in favor of the death penalty because it provides that
11 the death penalty "shall" be imposed if one or more aggravating factors are found and
12 mitigating circumstances are insufficient to call for leniency. *Id.* at 651-52 (citing *Blystone*
13 *v. Pennsylvania*, 494 U.S. 299 (1990), and *Boyde*, 494 U.S. at 370); *see also Marsh*, 548 U.S.
14 at 173-74 (relying on *Walton* to uphold Kansas's death penalty statute, which directs
15 imposition of the death penalty when the state has proved that mitigating factors do not
16 outweigh aggravators); *Smith*, 140 F.3d at 1272 (summarily rejecting challenges to the
17 "mandatory" quality of Arizona's death penalty statute and its failure to apply a beyond-a-
18 reasonable-doubt standard). In addition, the Supreme Court has held that a capital sentencer
19 "need not be instructed how to weigh any particular fact in the capital sentencing decision."
20 *Tuilaepa v. California*, 512 U.S. at 979.

21 Prosecutors have wide discretion in making the decision whether to seek the death
22 penalty. *See McCleskey v. Kemp*, 481 U.S. 279, 296-97 (1987); *Gregg*, 428 U.S. at 199
23 (pre-sentencing decisions by actors in the criminal justice system that may remove an
24 accused from consideration for the death penalty are not unconstitutional). In *Smith*, the
25 Ninth Circuit rejected the argument that Arizona's death penalty statute is constitutionally
26 infirm because "the prosecutor can decide whether to seek the death penalty." 140 F.3d at
27 1272.

28 With regard to probable cause for aggravating factors, the Supreme Court has held

1 that facts constituting the elements of an offense rather than just a sentencing enhancement
2 must be charged in a federal indictment. *See Jones v. United States*, 526 U.S. 227, 252
3 (1999). However, the Fifth Amendment Due Process Clause does not incorporate the same
4 requirements upon state criminal prosecutions by virtue of the Fourteenth Amendment. *See*
5 *Hurtado v. California*, 110 U.S. 516, 538 (1884); *Branzburg v. Hayes*, 408 U.S. 665, 688
6 n.25 (1972). And the Arizona Supreme Court has expressly rejected the argument that *Ring*
7 requires that aggravating factors be alleged in an indictment and be supported by probable
8 cause. *McKaney v. Foreman*, 209 Ariz. 268, 270, 100 P.3d 18, 20 (2004). Petitioner cites
9 no authority to the contrary.

10 Nor has Petitioner cited authority that he was entitled to voir dire the sentencing
11 judge. Although the Constitution requires that a defendant receive a fair trial before a fair
12 and impartial judge with no bias or interest in the outcome, *see Bracy v. Gramley*, 520 U.S.
13 899, 904-05 (1997), trial judges, like other public officials, operate under a presumption that
14 they properly discharge their official duties. *See United States v. Armstrong*, 517 U.S. 456,
15 464 (1996); *see also State v. Perkins*, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984) (trial
16 judge is presumed to be free of bias and prejudice). The presumption of regularity applies
17 absent clear evidence to the contrary. *See Armstrong*, 517 U.S. at 464; *see also State v.*
18 *Rossi*, 154 Ariz. 245, 248, 741 P.2d 1223, 1226 (1987) (mere possibility of bias or prejudice
19 does not entitle a criminal defendant to voir dire the trial judge at sentencing). Petitioner
20 made no allegation of bias or prejudice when he raised this issue before the Arizona Supreme
21 Court and makes no such allegation here.

22 Finally, there is no federal constitutional right to proportionality review of a death
23 sentence, *McCleskey*, 481 U.S. at 306 (citing *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984)),
24 and the Arizona Supreme Court discontinued the practice in 1992, *State v. Salazar*, 173 Ariz.
25 399, 417, 844 P.2d 566, 584 (1992). The Ninth Circuit has explained that the interest
26 implicated by proportionality review—the “substantive right to be free from a
27 disproportionate sentence”—is protected by the application of “adequately narrowed
28 aggravating circumstance[s].” *Ceja*, 97 F.3d at 1252.

C. Lethal Injection Protocol

In Claim 27, Petitioner alleges that Arizona's lethal injection protocol constitutes cruel and unusual punishment. The Arizona Supreme Court rejected this claim. *Sansing I*, 200 Ariz. at 361, 26 P.3d at 1132. Petitioner does not assert how this ruling conflicts with or unreasonably applies controlling Supreme Court law. *See Baze v. Rees*, 553 U.S. 35 (2008). Moreover, the Ninth Circuit has concluded that Arizona's lethal injection protocol does not violate the Eighth Amendment. *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).

D. Length of Time on Death Row

In Claim 28, Petitioner asserts that inordinate delay in carrying out his sentence violates his rights under the Eighth Amendment. However, the United States Supreme Court has never held that lengthy incarceration prior to execution constitutes cruel and unusual punishment. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.) (Stevens, J. & Breyer, J., discussing denial of certiorari and noting the claim has not been addressed); *Thompson v. McNeil*, 129 S. Ct. 1299 (2009) (mem.) (Stevens, J. & Breyer, J., dissenting from denial of certiorari; Thomas, J., concurring, discussing *Lackey* issue). Circuit courts, including the Ninth Circuit, have also held that prolonged incarceration under a sentence of death does not violate the Eighth Amendment. *See McKenzie v. Day*, 57 F.3d 1493, 1493-94 (9th Cir. 1995) (en banc); *White v. Johnson*, 79 F.3d 432, 438 (5th Cir. 1996); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995).

E. Clemency Proceeding

In Claim 29, Petitioner alleges that his constitutional rights will be violated because he will not receive a fair clemency proceeding. In particular, he alleges the proceeding will not be fair and impartial based on the Clemency Board's selection process, composition, training and procedures, and because the Attorney General will act as the Board's legal advisor and as an advocate against Petitioner.

This claim is not cognizable on federal habeas review. Habeas relief can only be granted on claims that a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner's challenge to state clemency

procedures and proceedings does not represent an attack on his detention—i.e., his conviction or sentence—and thus does not constitute a proper ground for relief. *See Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (per curiam); *see also Woratzeck v. Stewart*, 118 F.3d 648, 653 (9th Cir. 1997) (per curiam) (clemency claims are not cognizable under federal habeas law).

CONCLUSION

Petitioner has failed to show entitlement to habeas relief on any of his claims. In addition, the requested evidentiary development of Claims 1, 2, 3, and 6 is neither required nor warranted.

CERTIFICATE OF APPEALABILITY

Rule 22(b) of the Federal Rules of Appellate Procedure provides that an applicant cannot take an appeal unless a certificate of appealability has been issued by an appropriate judicial officer. Rule 11(a) of the Rules Governing Section 2254 Cases provides that the district judge must either issue or deny a certificate of appealability when it enters a final order adverse to the applicant. If a certificate is issued, the court must state the specific issue or issues that satisfy 28 U.S.C. § 2253(c)(2). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner “has made a substantial showing of the denial of a constitutional right.” This showing can be established by demonstrating that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner” or that the issues were “adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

The Court finds that reasonable jurists could debate its resolution of Claims 1, 2, 7, 8, and 12. For the reasons stated in this order, the Court declines to issue a COA with respect to any other claims or procedural issues.

Based on the foregoing,

IT IS ORDERED that Petitioner’s Petition for Writ of Habeas Corpus (Doc. 35) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

1 **IT IS FURTHER ORDERED** that Petitioner's Motion for Evidentiary Development
2 (Doc. 53) is **DENIED**.

3 **IT IS FURTHER ORDERED** that the stay of execution entered by the Court on May
4 26, 2011 (Doc. 7) is **VACATED**.

5 **IT IS FURTHER ORDERED** that a Certificate of Appealability is **GRANTED** as
6 to the following issues:

7 Whether Claim 1—alleging that Petitioner is entitled to relief based on *Ring*
8 error—is without merit;

9 Whether Claim 2—alleging that trial counsel performed ineffectively with
10 respect to the investigation and presentation of mitigating evidence—is
11 without merit;

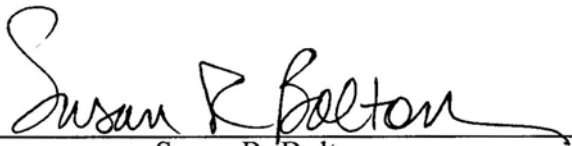
12 Whether Claim 7—alleging that the state courts violated Petitioner's rights by
13 applying a "causal nexus" test to his mitigating evidence—is without merit;

14 Whether Claim 8—alleging that Petitioner's plea was not knowing, intelligent,
15 or voluntary—is without merit; and

16 Whether Claim 12—alleging that the state court violated Petitioner's rights by
17 refusing to consider the victim's daughter's recommendation of leniency as a
18 mitigating factor—is without merit.

19 **IT IS FURTHER ORDERED** that the Clerk of Court forward a courtesy copy of
20 this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ
21 85007-3329.

22 DATED this 7th day of February, 2013.

23 
24 _____
25 Susan R. Bolton
26 United States District Judge
27
28